



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

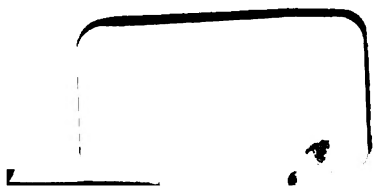
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

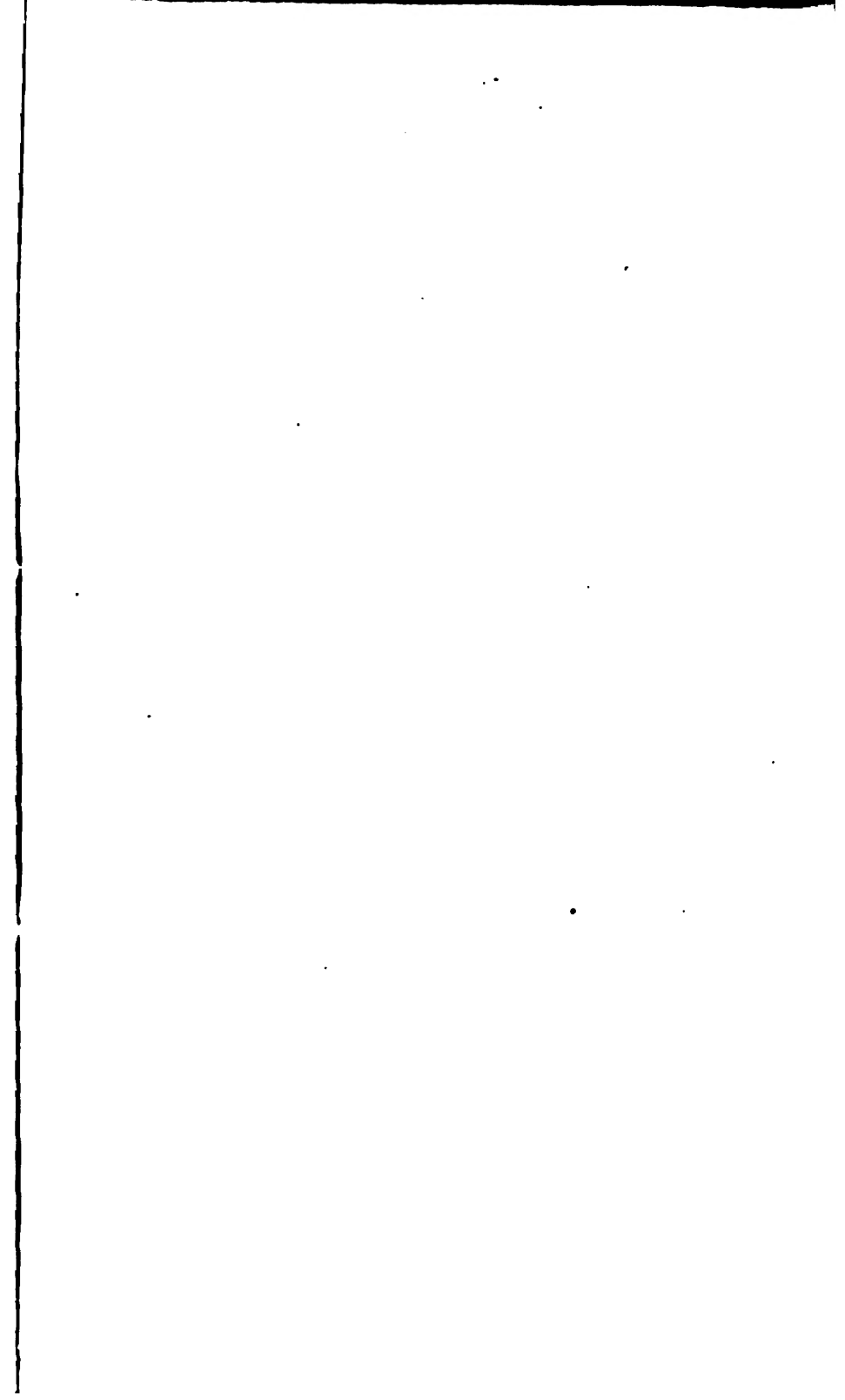
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

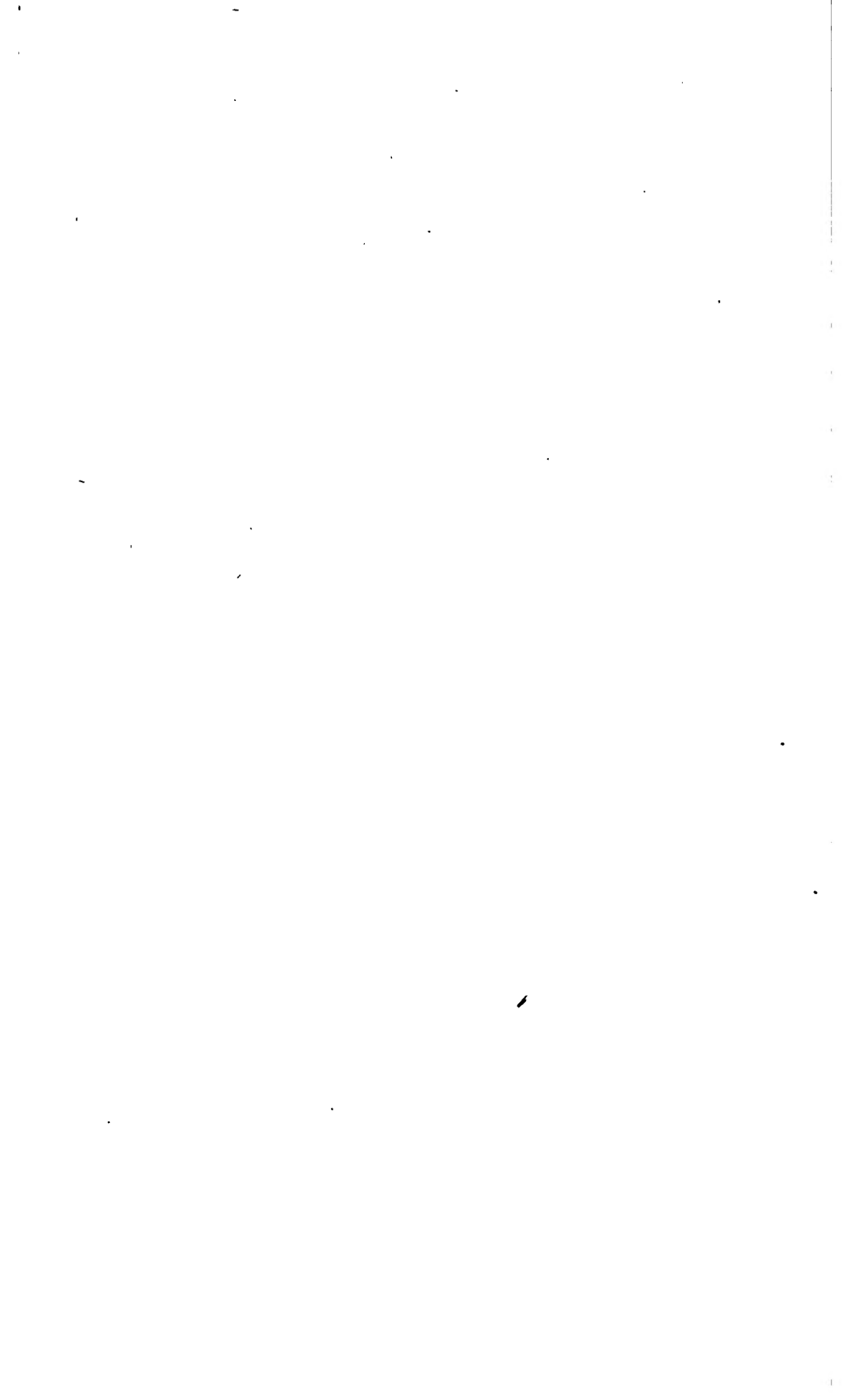


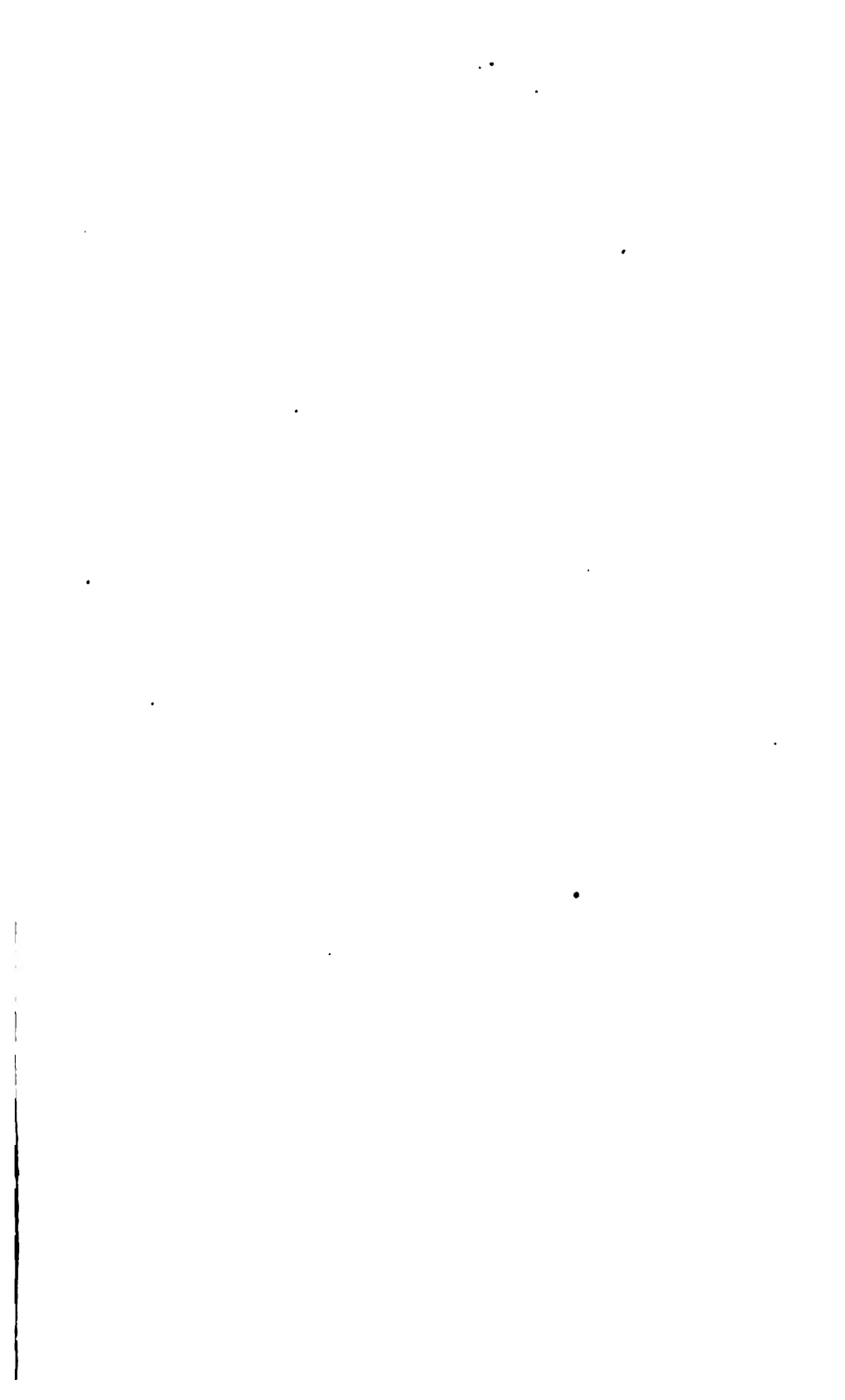














REPORTS OF CASES

DECIDED IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES, Circuit Court of

FOR THE

(NINTH CIRCUIT)

REPORTED BY

L. S. B. SAWYER.

COUNSELOR AT LAW.

VOLUME XI.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW BOOK PUBLISHERS, BOOKSELLERS, AND STATIONERS.
1887.

**LIBRARY OF THE
LELAND STANFORD JR. UNIVERSITY.**

R ~~44430~~ 43130

Entered according to Act of Congress, in the year 1887,
By BANCROFT-WHITNEY COMPANY,
In the Office of the Librarian of Congress, at Washington.

JUDGES

OF THE

U. S. CIRCUIT AND DISTRICT COURTS,

FOR THE NINTH CIRCUIT.

HON. STEPHEN J. FIELD,

Justice of the Supreme Court allotted to the Circuit.

HON. LORENZO SAWYER,

Circuit Judge.

DISTRICT JUDGES.

HON. OGDEN HOFFMAN, . . District of California.

HON. MATTHEW P. DEADY, . . District of Oregon.

HON. GEORGE M. SABIN, . . District of Nevada.

TABLE OF CASES REPORTED.

A.

	PAGE.
Abercorn, The.....	530
Abraham, et al., v. Western Union Telegraph Co.....	28
Adams, United States v.....	103
Ah Ping, <i>In re</i>	17
Ah Hon.....	211
Ah Lit.....	447
Allen v. O'Donald.....	45
American Freehold Land Mortgage Co. v. Groves.....	92

B.

Baldwin, <i>In re</i>	533
Bark Hunter, The.....	426
Board of Supervisors San Francisco, Rosenbaum v....	620
Bragg v. Stockton.....	597
Bunt v. Sierra Buttes Gold Mining Co.....	178
Bybee v. Oregon & California Railway Co.....	479
Bark Murray, The	416

C.

California Electrical Works, United Nickel Co. v. . . .	250
Carr, Wells, Fargo & Co. v.....	272
Central Pacific Railroad Co., United States v.....	438
Chico, Silsby Manufacturing Co. v.....	183
Coffin v. Portland.....	601
Columbia Street Bridge Co., Scheerer v.....	575
Commercial Fire Insurance Co., Endey v.....	137
Consolidated Amador Mine, Fisher v.	190
Cooper, Dundee Mortgage & Trust Investment Co. v..	501
Crane v. Buney.....	418
Crittenden, Mercartney v.....	113
Crowley, Yick Wo v.....	422
Curtner, United States v.....	411

D.

	PAGE
Director, The	493
Dundee Mortgage and Trust Investment Co. v. Parrish.	92
Dundee Mortgage and Trust Investment Co. v. Cooper.	501
Dundee Mortgage and Trust Investment Co., Hughes v.	545
Dundee Mortgage and Trust Investment Co., Hughes v.	553
Dundee Mortgage and Trust Investment Co., King v..	663

E.

El Dorado Co., Hall v.....	92
El Dorado Co., Nash v.....	86
Elliott, Hickox v	624
Endey v. Commercial Fire Insurance Co.....	137
Ewing, Smith v.....	56
<i>Ex parte</i> Ah Lit.....	447
<i>Ex parte</i> Koehler.	37
<i>Ex parte</i> Koehler.....	191
<i>Ex parte</i> Hanson.....	657
<i>Ex parte</i> Hibbs	452

F.

Farmers Loan and Trust Co. v. Oregon & Cal. R'y Co.	115
Fisher v. Consolidated Amador Mine.....	190

G.

Goldmark v. Kreling.....	215
Grand Jury, <i>In re</i>	522
Griswold, United States v	65
Groves, American Freehold Land Mortgage Co. v.	92
Groves, New England Mortgage Security Co. v.....	92

H.

Hall v. El Dorado Co.....	92
Hardt v. Liberty Hill Con. Mining & Water Co.	611
Hanson, <i>In re</i>	657
Hearing, United States v.....	514
Hielner, United States v	406
Hibbs, <i>In re</i>	452
Hickox v. Elliott.....	624
Hill, Sharon v.....	122
Hill, Sharon v.....	290

	PAGE
Hughes v. Dundee Mortgage & Trust Investment Co...	545
Hughes v. Dundee Mortgage & Trust Investment Co...	553
Hunter, The Bark.....	426

I.

<i>In re</i> Ah Ping	17
<i>In re</i> Ah Lit.....	447
<i>In re</i> Baldwin.....	533
<i>In re</i> Jung Ah Lung.....	211
<i>In re</i> Jung Ah Hon.....	211
<i>In re</i> Grand Jury	527
<i>In re</i> Hanson.....	657
<i>In re</i> Hibbs	452
<i>In re</i> Koehler.....	191
<i>In re</i> Koehler.....	37
<i>In re</i> McVey.....	25
<i>In re</i> Sung Hung.....	173
<i>In re</i> North Bloomfield Mining Co.....	590
Ireland, Theurkauf v.....	512
<i>In re</i> Tie Loy.....	472
<i>In re</i> Wo Lee.....	429
Irwin, San Francisco Savings Union v.....	667

J.

Jung Ah Hon, <i>In re</i>	211
Jung Ah Lung, <i>In re</i>	211

K.

Kie v. United States.....	579
King v. Dundee Mortgage and Trust Investment Co...	663
Koehler, <i>In re</i>	191
Koehler, <i>In re</i>	37
Kreling, Goldmark v.....	215

L.

Lakin v. Sierra Buttes Mining Co.....	231
Liberty Hill Con. Mining and Water Co., Hardt v....	611
Liebmann v. City of San Francisco.....	147

M.

McCallister, Reid v.....	35
McLaughlin, United States v.....	139

	PAGE
McVey, <i>In re</i>	25
Mercartney v. Crittenden	113
Meyers v. Shurtleff	50
Miller v. Wattier	74
Miner, Wells, Fargo & Co. v.	280
Murray, The Bark	416

N.

Nash v. El Dorado County	86
New England Mortgage Security Co. v. Groves	92
North Bloomfield Mining Co., <i>In re</i>	590

O.

O'Donald, Allen v.	45
Oregon & California Railway Co., Bybee v.	479
Oregon & California R. Co., Farmers L. & T. Co. v. ..	115
Oregonian Railway Co. v. Oregon Railway & Nav. Co.	33
Oregonian Railway Co. v. Oregon Railway & Nav. Co.	565
Oregon Railway & Nav. Co., Oregonian Railway Co. v.	33
Oregon Railway & Nav. Co., Oregonian Railway Co. v.	565

P.

Parrish, Dundee Mortgage and Trust Investment Co. v.	92
Phoenix Insurance Co., Thompson v.	276
Portland, Coffin v.	600

Q.

Queen of the Pacific	195
----------------------------	-----

R.

Reed, Seeley v.	259
Reid v. McCallister	35
Rose, United States v.	83
Rosenbaum v. Board of Supervisors, etc.	620
Runey, Crane v.	418

S.

San Francisco, Liebman v.	147
San Francisco Savings Union v. Irwin	667
San Francisco, Rosenbaum v.	620
Scheerer v. Columbia Street Bridge Co.	575
Seeley v. Reed	259

	PAGE
Sinnott, United States <i>v.</i>	398
Sharon <i>v.</i> Hill	290
Sharon <i>v.</i> Hill	122
Shurtleff, Meyers <i>v.</i>	50
Sierra Buttes Gold Mining Co., Bunt <i>v.</i>	178
Sierra Buttes Gold Mining Co., Lakin <i>v.</i>	231
Silsby Manufacturing Co. <i>v.</i> Chico	183
Smith <i>v.</i> Ewing	56
Stockton, Bragg <i>v.</i>	597
Sun Hung, <i>In re.</i>	173

T.

The Abercorn	530
The Bark Hunter	426
The Bark Murray	416
The Director	493
The Zealandia	405
Thompson <i>v.</i> Phoenix Insurance Co.	276
The Queen of the Pacific	195
Tie Loy, <i>In re.</i>	472
Theurkauf <i>v.</i> Ireland	512

U.

United States <i>v.</i> Adams	103
United States <i>v.</i> Central Pacific Railroad Co.	438
United States <i>v.</i> Curtner	411
United States <i>v.</i> Griswold	65
United States <i>v.</i> Hearing	514
United States <i>v.</i> Hielner	406
United States, Kie <i>v.</i>	579
United States <i>v.</i> McLaughlin	139
United Nickel Co. <i>v.</i> California Electrical Works	250
United States <i>v.</i> Rose	83
United States <i>v.</i> Sinnott	398

W.

Waterman <i>v.</i> Waterman	489
Waterman, Waterman <i>v.</i>	489
Wattier, Miller <i>v.</i>	74
Wells, Fargo & Co. <i>v.</i> Miner	280
Wells, Fargo & Co. <i>v.</i> Carr	272

	PAGE
Western Union Telegraph Co., Abraham v	28
Wo Lee, <i>In re</i>	429
Y.	
Yick Wo v. Crowley	422
Z.	
Zealandia, The	405

DECISIONS
OF THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES, FOR THE NINTH CIRCUIT.

IN RE AH PING.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
MARCH 30, 1885.

1. CHINESE RESTRICTION ACTS—MERCHANTS TEMPORARILY DEPARTING.—A Chinese merchant, residing and doing business in the United States, who temporarily departed therefrom before the passage of the Chinese restriction act, is entitled to re-enter the same without producing the certificate required by section six of the act of 1882, as amended in 1884.
2. THE SAME—RESTRICTION ACTS HOW CONSTRUED.—The acts of congress, commonly called the Chinese restriction acts, should be so construed, if possible, as not to bring them into conflict with stipulations in the treaties between the United States and China.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

Thos. D. Riordan, for the petitioner.

S. G. Hilborn, United States attorney, *contra*.

By the Court, SAWYER, Circuit Judge. This is an appeal from the district court.

The petitioner is a Chinese subject of the Mongolian race, a merchant, not a Chinese laborer, and a member of the old and well known firm of Hop Sing & Co., doing a mercantile business in the city and county of San Francisco, of which firm he has been a member since 1877. He resided in the United States, continuously, for the period of eight years, prior to 1879, in which year he departed from California,

Opinion of the Court—Sawyer, C. J.

[March,

for the purpose of visiting China, and returned to the United States on November 30, 1881, before the passage of the original Chinese restriction act. He remained at San Francisco from the last named date, engaged in the business of his said firm, until February 1, 1882, when he departed for Victoria, British Columbia, to, temporarily, attend to the business of the firm, which has a branch at that place. On July 19, 1884, after the passage of the Chinese restriction act, he departed from Victoria, and arrived at the port of San Francisco, by sea, July 23, 1884. He did not produce any certificate, of the kind required by section six of the restriction act, as amended in 1884, or as required by the act of 1882. The question upon this state of facts is, whether Ah Ping is entitled to land? Or whether the sixth section of the restriction act, as amended by the act of 1884, is applicable to a Chinese merchant, one of a firm residing, and doing their principal business in the United States, who, temporarily, departed therefrom before the passage of said act, to attend to a branch of the firm's business in British Columbia, and who returned to the United States after the passage of the act? I have never had occasion before to consider this precise question. Although it may be possible, it would be impracticable for the petitioner to go to China, and obtain the certificate required by that section, and, if the provisions of the section are applicable, no other evidence is admissible. If section six is applicable, then the petitioner is not, otherwise he is, entitled to land.

The question, at issue, depends upon a construction of the clause of section six: "*Every Chinese person, other than a laborer, who may be entitled by said treaty, or this act, to come within the United States, and who shall be about to come to the United States,*" shall obtain the permission of, and be identified as so entitled, in the mode provided. This, with the clause in the same section, making the certificate the sole evidence as to those to whom it is applicable, is the only provision, either in the treaties in force or the act, putting any limitation upon the right of a Chinese merchant to come and go of his own free will, without any limitation or legal obstruction. The only equivocal words in

1885.]

Opinion of the Court—Sawyer, C. J.

the clause, taken literally, would seem to be, "who shall be about to come to the United States." Does this phrase mean persons residing, or domiciled abroad, who leave their residence, or domicile, "to come to the United States," either for travel or pleasure, or to take up their residence here, or for other purposes; or does it, also, include Chinese subjects already domiciled in the United States having their residence and business here, and who left the country temporarily, before, or who shall leave it after the passage of the act, for temporary purposes, with the intention of returning, after the accomplishment of such purposes, to their residence in the United States? We are satisfied, upon the rules of construction and principles established by the supreme court of the United States, in *Chew Heong v. U. S.* (112 U. S., 536), decided at the present term of the court, that this provision should be so construed as not to embrace the latter class. To give the section any other construction, would be to bring the act into direct conflict with the treaty, which the supreme court says should not be done, if such a construction can be avoided. The object of the act is, undoubtedly, to prevent the increase in this country of the number of Chinese laborers, and this provision is designed to furnish means for readily identifying parties entitled to enter the United States.

As to those domiciled in foreign countries, there is no ready means in this country for their identification. In the countries whence they propose to come, the means of ascertaining the facts are at hand. Hence the provision. As to those resident, or domiciled in this country, we have ourselves the best means of identification; while, as to many of them, even in their native country, and much less when they are, temporarily, in other foreign countries, there is no practicable means of either identification, or for procuring the certificate prescribed.

The United States statutes do not now, nor have they ever, required, or provided for the issue of any certificate in this country to resident Chinese, other than laborers, who are about to depart, temporarily, for business, or

Opinion of the Court—Sawyer, C. J.

[March,

pleasure, either to China, or other foreign countries. There are many Chinese merchants in California, who have been domiciled in the state from twenty to thirty-five years. Our own means of identification of such persons are, greatly, superior to those of any other country, even that of their nativity. To require such parties, every time they go to another country, to perform the required acts abroad, would be utterly impracticable, and, practically, tantamount to an absolute refusal to permit their return.

The treaty between the United States and China of 1868, commonly called the Burlingame treaty, guaranteed to Chinese subjects the right, without any conditions, or restrictions, to come, remain in, and leave the United States, and to enjoy all the privileges, immunities and exemptions enjoyed by the citizens and subjects of the most favored nation. (16 Stat. 740.) The treaty of November 17, 1880, puts no limitation upon this right, and does not authorize expressly, or by implication, any legislation of congress putting any limitation upon the rights of Chinese, other than "Chinese laborers." The language of the treaty is: "The limitation or suspension shall be reasonable and shall apply *only* to Chinese, who may go to the *United States as laborers, other classes not being included in the limitations.*" (22 R. S. 826.) On the contrary, articles 2 and 3, of the latest treaty, in express terms, guarantee, that all Chinese of any class, "now either permanently, or temporarily, residing in the territory of the United States, shall be secured the same rights, privileges, immunities, and exemptions, as are enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by the treaty." There is nothing, therefore, in any of the treaties, that, expressly, or, by implication, authorizes congress to put any restriction upon the right to come and go, of such parties, while, in other respects they are, expressly, placed upon the footing of all other most favored foreigners. If then, there is anything in the restriction act, that puts a limit upon these rights, such limitation is a direct violation of the express provisions of the several treaties with China, now in force. While such a provision, in an act of con-

1885.]

Opinion of the Court—Sawyer, C. J.

gress, would, undoubtedly, repeal the conflicting provisions of the treaties, as we have always, heretofore, held, yet, under the late decision of the supreme court, courts should, if possible, so construe the act of Congress, as not to bring it into conflict with treaty stipulations. Upon the principles established in the case cited, we are satisfied that the act can be fairly construed so as not to include this case. Section one provides, in explicit terms, the literal meaning of which cannot well be misunderstood, that "during such suspension, it shall not be lawful for *any Chinese laborer to come from any foreign port, or place, or, having so come, to remain in the United States.*" And section two, makes it an offense for the master of any vessel to "knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed, *any Chinese laborer from any foreign port or place.*" This language, without the limitation put upon it by the provisions of section three, that it shall not apply to persons within the United States at the date of the treaty, is as broad and specific as it is possible to be, and, literally, construed, includes every individual laborer of the Chinese race. Yet, the supreme court, after quoting those provisions of sections one and two, explicitly says, in substance, that if they had *stood alone, without the limiting clause of section three*, its construction of the act would be the same as it is now. The exact language of the court, speaking through Mr. Justice Harlan, is: "*If these sections constituted the entire legislation in reference to the coming to this country of Chinese laborers, the court, under the established rules for the interpretation of statutes, would hold, that they did not apply to Chinese laborers, who, by their residence in the United States, at the date of the last treaty, had acquired the right to go and come of their own free will, and to enjoy such privileges, immunities and exemptions as were accorded here to citizens and subjects of the most favored nation.* For since the purpose avowed in the act, was, to faithfully execute the treaty, any interpretation of its provisions would be rejected, which imputes to congress an intention to disregard the plighted faith of the government, and, consequently, court ought, if possible, to adopt that construction

Opinion of the Court—Sawyer, C. J.

[March,

which recognized and saved rights secured by the treaty. The utmost that could be said in the case supposed, would be, that there was an apparent conflict between the mere words of the statute and the treaty, and that, by implication, the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure."

This language, it is true, goes farther than was, absolutely, necessary under the facts of that case; but it is the deliberate statement, that the court would have so held, had the facts required it. Such a deliberate announcement made, under the circumstances of the case, we cannot regard as a mere *dictum*, or the expression of the individual opinion of the judge delivering the judgment. We look upon it as binding upon this court, as a rule of decision. The court simply apply the universally recognized rule, that the repeal of a statute or treaty by implication is not favored. In this case, the clause of section six, under consideration, is less specific, as the words, "who shall be about to come into the United States," are more ambiguous, and are fairly open to the construction upon the language itself, in view of the surrounding circumstances, that they are, only, applicable to those coming for the first time, or to persons having no present domicile or residence in the United States, but having their actual residence, or domicile, in a foreign country, about to come into the United States, either on business, for travel, or as temporary or permanent residents.

At the time the petitioner left his residence in San Francisco, for British Columbia, on the business of his firm, both under the treaties and under the laws of the United States, then in force, he had a legal right to return, without any conditions or restrictions, not applicable to subjects of any other, or "the most favored nation." He had no reason to anticipate any change of the law. At his departure he had a vested right under the treaties and laws, then in full force to return. He had a right to rely on the laws as they, then, were. If, by the act in question, it was intended to

1885.]

Opinion of the Court—Sawyer, C. J.

cut off his right of return, then it was the deliberate intention of congress to violate the treaty and cut off a right vested in the petitioner, both by the treaties and other laws of the land. As we have seen, the act must, if possible, be so construed as not to work this wrong. The supreme court, in support of the construction given to the act, in the case cited, further observes: "To these [reasons] may be added the further one, that courts, uniformly, refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear, and positive, as to leave no room to doubt, that such was the intention of the legislature." To give the construction insisted on by the United States attorney, would be to give the act a retrospective operation, which would injuriously affect the right of the petitioner to return, vested under the treaties and laws in force at the time of his departure for temporary purposes to British Columbia. And, as we have seen, there is less ground for holding that the petitioner is included within the purview of the act, than in the case decided by the supreme court, upon the hypothesis assumed in the paragraphs quoted from the decision.

The following language of the supreme court in Chew Heong's case is, equally, applicable to the petitioner in this case. "It is also said, in support of the judgment, that the sixth section is significant, in that it prescribes the mode for the coming to this country of Chinese persons, 'other than a laborer who may be entitled by said treaty and this act to come within the United States,' *but fails to provide the means for the return and identification of Chinese laborers, who were entitled by the treaty to return, but who were out of the country when the act of congress was passed.* But this argument, like the one just alluded to, *only proves that congress, while making provision for the coming of persons, who were entitled to come, other than laborers, omitted to make special provision in reference to the latter, and, consequently, left them to stand upon their rights as secured by the treaty, and if their right to enter the United States was questioned, to prove in some way, consistent with the general principles of law, that they belonged to the class entitled to go and come.*"

Opinion of the Court—Sawyer, C. J.

[March,

With as good reason may it be said, that, congress, while providing for the case of Chinese, other than laborers, domiciled in foreign countries, not residents of the United States, temporarily absent on business or pleasure, "who shall be about to come to the United States," "omitted to make any special provision in reference to" Chinese residents of the United States, temporarily, absent, with a right to return, at the date of the passage of the act, or who after the passage of the act, temporarily, leave the United States for foreign countries on business or pleasure, "and, consequently, left them to stand upon their rights as secured by the treaty, and, if their right to enter the United States was questioned, to prove in some way consistent with the general principles of law, that they belonged to the class entitled to go and come."

If we have interpreted the principles established by the supreme court aright, the result is, that section 6 of the restriction act, is not applicable to Chinese subjects, residents of the United States, who left the United States, for foreign countries for temporary purposes, intending to return, before the passage of the amendatory restriction act, having a right to return at the time of their departure, and, who did not return till after the passage of the act; nor to Chinese subjects, residents of the United States, departing for temporary purposes of business, or pleasure, since the passage of the act. This is the construction acted upon by the executive department of the government, and, we think, is fully justified in these particulars, by the decision of the supreme court.

It results that the judgment of the district court must be reversed, and the petitioner discharged.

It is but just to say, that the judgment of the district court was rendered before the receipt here of the decision of the supreme court in Chew Heong's case. If there are any expressions in any of my former opinions, apparently inconsistent with the views here adopted, they are in opinions rendered before the decision of the supreme court in the case cited, and they had special reference to the facts in the case decided, and no reference to the point now involved.

1885.]

Opinion of the Court—Hoffman, J.

Let the judgment of the district court be reversed, and the petitioner discharged.

IN RE McVEY.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

APRIL 2, 1885.

1. COURTS MARTIAL—JURISDICTION OF CIVIL COURTS—HABEAS CORPUS.—

Within the sphere of their jurisdiction, the judgment and sentences of courts martial are as final and conclusive as those of civil tribunals of last resort, and the only authority of the civil courts is to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, they cannot be interfered with, no matter what errors may be committed in the exercise of their lawful jurisdiction.

On habeas corpus.

J. H. Dickinson, for petitioner.

Lieut. Col. W. Winthrop, Dep. Judge, Adv. Gen., for respondent, *Major A. M. Randol*, First Artillery.

HOFFMAN, J. The return of the writs shows that the petitioner is a military convict, imprisoned under the sentence of a military court-martial, regularly convened at Fort Vancouver, Washington territory. The record of the court-martial shows that the petitioner was tried for having deserted on the thirteenth of April, 1877, from an enlistment made March 12, 1877. In his defense, the petitioner pleaded that at the time of his enlistment he was a deserter; that in 1875 he had been tried and convicted of a desertion from a previous enlistment; that he had been sentenced to imprisonment and to be dishonorably discharged from service; that he had escaped from custody without receiving a certificate of discharge and had subsequently made the enlistment, for desertion from which he was on trial. He therefore claimed, that under section 1118 of the revised statutes, which prohibits the enlistment of a "deserter," his enlistment was void, and that he could not be

held for the violation of an engagement prohibited by law. The court overruled the plea, and the petitioner was tried, convicted and sentenced. It is not denied that, within the sphere of their jurisdiction, the judgments and sentences of courts-martial are as final and conclusive as those of civil tribunals of last resort. (*In re Bogart*, 2 Sawy. 402; *Dynes v. Hoover*, 20 How. 82.)

The only authority of the civil courts is "to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, we cannot interfere, no matter what errors may be committed in the exercise of their lawful jurisdiction." (Per Mr. Justice Sawyer, *in re White*, 9 Sawy. 52; S. C. 17 Fed. Rep. 723.) In the same case it is observed:

"It is not disputed that a military court-martial has general jurisdiction to try a party for the military offense of desertion. * * * This covers the whole ground. Jurisdiction to determine whether the party is guilty of the offense necessarily involves the jurisdiction to determine what constitutes the offense under the statute--jurisdiction to construe the statute and adjudge what under the statute constitutes a good defense against the prosecution; and to determine whether or not the facts exist which are claimed to constitute a valid defense."

If, as is held by Mr. Justice Sawyer, "jurisdiction to determine whether a party is guilty of the offense necessarily involves the jurisdiction to determine what constitutes the offense," the proceedings of the court-martial in the present case were within its jurisdiction.

I have met with no reported cases where a defense such as now set up has been entertained; still less where the sentence of a court-martial, after disallowance of the plea, has been held void for want of jurisdiction. The very defense, however, has heretofore been interposed. In the valuable digest of opinions of the judge advocate general by Lieut. Col. Winthrop, I find a note of an opinion by the judge advocate general, as follows:

"A deserter who enlists, and afterwards again deserts, cannot, on being brought to trial for the second offense,

1885.]

Opinion of the Court—Hoffman, J.

defend on the ground that his enlistment was void, and that he, therefore, is not amenable to trial. A plea or defense to this effect should not be sustained by the court."

I cite this ruling to show that the defense now relied on has been heretofore set up, and that the question of its validity has apparently been left to the determination of the military tribunal.

It is true that (*in re* Wall, 8 Fed. Rep. 85), Mr. Justice Lowell declines to decide whether an illegally enlisted minor who openly leaves the service, after formally demanding his discharge, would be guilty of desertion; but he does not intimate that if tried and convicted by a court-martial, its judgment would be wholly void for want of jurisdiction. By the forty-seventh article of war it is provided:

"That any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war suffer death," etc.

It would seem that in this article the reception of pay is treated as the equivalent of a due enlistment. In the case at bar, the petitioner was, at the time of his desertion, a *de facto* soldier of the United States. He had voluntarily assumed the obligations, and had attempted to secure the rights, of an enlisted man. To avoid the consequences of his last crime, he sets up as a defense that he has committed three previous offenses: 1. A former desertion; 2. escape from confinement after conviction of that crime, and without waiting for a certificate of dishonorable discharge; 3. a fraudulent re-enlistment in violation of the law and under an assumed name. It is not claimed on the argument that during the time of his actual service he could commit with impunity any military offense. It was only contended that he could not commit the offense of desertion. The distinction is not very apparent. It would seem that he must be regarded either as a civilian or a soldier. If the former, he was not amenable to the military law. If the latter, he was subject to that law for any offense against its provisions. But the claim to impunity from punishment for desertion would even extend to desertion by a sentry from

Opinion of the Court—Deady, J.

[April,

his post, by which the safety of the army might be compromised, or to desertions in time of war in the face of the enemy, and even to desertions to the enemy for the purpose of conveying plans of fortifications or other information obtained in the course of his service.

It may be urged with great force: 1. That by the general principles of law a man cannot profit by his own wrong, still less by his crime; 2. that the obvious intent of the statutory provisions prohibiting the enlistment of deserters was to attach an additional penalty for a crime, and not to confer an immunity from the consequences of its repetition; and, 3. that the interests and even the necessities of the service forbid the allowance of the defense set up by the petitioner. But this question it is unnecessary, perhaps improper, now to decide; for even if the ruling of the court-martial was erroneous, this court has no jurisdiction to correct the error or to reverse its judgment.

Petitioner remanded.

S. ABRAHAM ET AL. v. THE WESTERN UNION TELEGRAPH COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

APRIL 3, 1885.

1. TELEGRAPHY—BUSINESS OF—RESPONSIBILITY OF PERSON EMPLOYED IN—A person engaged in the business of telegraphy, or the transmission of messages for hire, by means of electricity, is a public servant, and responsible to the party injured for any loss arising from his negligence in transmitting or delivering such a message; but he is not liable as an insurer of said message against errors consequent upon causes beyond his control.

Before DEADY, District Judge.

Mr. M. W. Fechheimer, for the plaintiff.

*Mr. Rufus Mallore*y, for the defendant.

DEADY, J. This action is brought by the plaintiffs, citizens of Oregon, against the defendant, a corporation formed

1885.]

Opinion of the Court—Deady, J.

under the laws of New York, and doing business in the state of Oregon, to recover damages to the amount of \$1854, caused by the alleged negligence of the defendant in sending and receiving a message for the plaintiffs between Glendale and Roseburg, Oregon.

It is alleged in the amended complaint that on October 30, 1883, the plaintiff, Walter Wheeler, sent a message over defendant's telegraph line from Glendale to Roseburg, to his partners and co-plaintiffs, by the firm name of Abraham, Wheeler & Co., in these words:

“GLENDALE, Or., Oct. 30th, 1883.

To Abraham, Wheeler & Co., Roseburg, Or.: Don't sell any wheat; hold a few days.

(Signed)

WALTER WHEELER.”

That the price demanded for transmitting said message was prepaid by the sender, in consideration of which the defendant undertook to deliver the same as written and addressed; that the defendant transmitted said message so negligently and unskillfully that the same was delivered to said Abraham, Wheeler & Co., at Roseburg, with the word “all” substituted for “any” in the original, in consequence of which the plaintiffs immediately sold nine thousand bushels of wheat, the same being a portion of a greater quantity they then had on hand, at ninety-seven and one-half cents per bushel, that being the market price at Roseburg therefor; but that thereafter, and on November 1, 1883, wheat was worth at that place one dollar and twenty-three and one-half cents per bushel; and that it was the intention of said Wheeler in sending said message to have the plaintiffs hold said wheat for a time and thereby receive the advance thereon, and the plaintiffs would have done so, and thereby realized said advance, if said message had been truly delivered.

By the amended answer the defendant denies: 1. Negligence in transmitting or delivering the message; 2. that the plaintiffs sold said wheat on account or by reason of the information or advice contained in said message as received by them, and avers that said sale was in fact contrary thereto; 3. that on November 1, 1883, wheat was worth at

Opinion of the Court—Deady, J.

[April,

Roseburg one dollar and twenty-three and one-half cents per bushel or any more than eighty-one cents per bushel; 4. knowledge as to the intention of said Wheeler in sending said message or as to whether the plaintiffs would have realized any greater price for said wheat if said message had been duly delivered; that the plaintiffs were damaged in the sum of one thousand eight hundred and fifty-four dollars or at all, by the negligence of the defendant in sending or receiving said message; and also sets up up a special defense, to the effect that the error in sending the message was the result of natural causes beyond the control of the defendant.

The answer also contains a statement intended either as a defense to the action or in mitigation of the damages claimed therein, that the message in question was received and transmitted by the defendant on the condition, and subject to the agreement, that it should not be liable for any mistake in the transmission or delivery of the same, whether caused by the negligence of the defendant or otherwise, beyond the amount paid for sending the same, unless it was repeated; and that the plaintiffs did not have said message repeated, whereby they assumed the risk of any mistake occurring in the transmission thereof.

To this statement or plea the plaintiffs demur, for that it does not constitute a defense in whole or part to the action, which is for damages caused by the negligence of the defendant.

Electricity has been in successful use as a means of transmitting messages and information for about forty years. During this time the responsibility of the person who undertakes to serve the public in this way and the nature of his employment have been the subject of much consideration and some conflicting judgments in the courts. With the progress of time and the marked improvements in the science of telegraphy there has been a tendency to hold telegraph companies to a higher degree of diligence and a larger measure of responsibility in the discharge of their duties to their employers.

From the first, an effort was made to liken the business of

1885.]

Opinion of the Court—Deady, J.

telegraphy to the carriage of goods by a common carrier. But the courts, with but probably one exception (*Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422), have declined to hold the telegrapher responsible as an insurer of the accuracy of messages transmitted by him, and have limited his liability to losses arising from mistakes resulting from his negligence in the discharge of the duties to his employment.

The liability of a common carrier is two-fold. The one arises from the fact that he is an insurer of the safety of the goods committed to his custody against loss from all danger or accident, except the act of God and the public enemy; and the other from the fact that he is a bailee of such goods, and as such responsible for any loss or injury thereto, consequent upon his own negligence. And the weight of authority is that he may by contract restrict his liability, as an insurer, but not as a bailee. Care and diligence are the essential duties of his employment in this respect, and it would be contrary to public policy to allow him to contract for less or to limit his responsibility for his own negligence.

And although a telegrapher is not an insurer, and therefore not responsible for an error in a message consequent on causes beyond his control, he is, like a common carrier, a servant of the public by reason of his employment, and bound to the exercise of care and diligence, adequate to the discharge of the duties thereof; and cannot by any notice, regulation or contract limit or control his liability for the negligence of himself or servants. As was said by Mr. Justice Strong in *Express Co. v. Caldwell*, (21 Wall. 269), "Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as that of carriers. Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence."

By section 17 of the act of October 17, 1862 (Or. laws, 776), it is provided that a telegraph company doing business in this state must transmit all messages in the order in which they are received, with certain exceptions of public interest, under a penalty of one hundred dollars.

This Act is a recognition as well as a declaration of the fact, that the employment of the defendant is a public one—"to be carried on," as was said by Bigelow, J., in *Ellis v. American Tel. Co.* (13 Allen, 231), "with a view to the general benefit and for the accommodation of the community, and not merely for private emolument and advantage."

And the measure of damages in an action against the defendant for a failure to perform a duty pertaining to this employment with due care and diligence, is the ordinary one in actions for damages caused by a neglect of duty. Any stipulation or notice limiting the defendant's liability in this respect is void and of no effect. Notwithstanding the contract or condition under which this message is alleged to have been sent by the plaintiff, if the error in its transmission was consequent upon the negligence of the defendant, or the want of ordinary care and prudence on the part of its servants, it is liable to the plaintiff for the damage sustained thereby. And this includes gains prevented as well as losses sustained, provided they are the natural and proximate consequence of the error or mistake.

In the case of an obscure or cipher message, of which the import or importance is not apparent to the operator, there is a conflict of authority as to whether or not the damages should be limited to the price of the message. (*Candee v. The Western Union Tel. Co.*, 34 Wis. 479; *Hart v. Id.*, 4 Pac. Rep. 658.)

But the case under consideration is one in which the message, by its terms informed the defendant of its import and importance, and the measure of damages for a breach of the undertaking to transmit it with care and diligence is the ordinary one.

It follows that the matter demurred to neither constitutes a defence to the action nor a mitigation of the damages sought to be recovered thereby, and therefore the demurrer must be sustained.

In addition to the authorities above cited the following cases have been examined, and are referred to as bearing on the question involved in this cause from various standpoints: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Jones v.*

1885.]

Opinion of the Court—Deady, J.

Voorhes, 10 Ohio, 145; *True v. International Tel. Co.*, 60 Maine, 1; *Bartlett v. The West. U. T. Co.*, 62 Maine, 209; *Redpath v. The West. U. T. Co.*, 112 Mass. 71; *Grinnell v. The West. U. T. Co.*, 113 Mass. 299; *The N. Y. & W. P. T. Co. v. Dryburg*, 35 Pa. St. 298; *Passmore v. West. U. T. Co.*, 78 Pa. St. 238; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; *Wan. v. The West. U. Tel. Co.*, 37 Mo. 472; *West. U. T. Co. v. Fenton*, 52 Ind. 1; *White v. The West. U. T. Co.*, 22 Fed. Rep. 710, and note.

THE OREGONIAN RAILWAY COMPANY, LIMITED, v. THE
OREGON RAILWAY AND NAVIGATION COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

APRIL 20, 1885.

1. A CONTRACT TO BUILD OR REPAIR.—A court of equity, as a rule, will not enforce the performance of a contract to construct or repair a railway.

Before DEADY, District Judge.

Mr. H. H. Northup and *Mr. John W. Whalley*, for the plaintiff.

Mr. Charles B. Bellinger, for the defendant.

DEADY, J. This is a bill for an injunction, requiring the defendant, as lessee of the plaintiff's road, to complete the same, and put certain portions thereof in repair, and operate the same, according to the covenants in the lease, or for the appointment of a receiver with authority to do such work at the expense of the defendant.

It appears from the bill that on August 1, 1881, the plaintiff being the owner of a railway in the Wallamet valley, commonly called the "Narrow Gauge," leased the same to the defendant for the period of ninety-six years, at a rental of twenty-eight thousand pounds sterling, a year, to be paid in half-yearly instalments. At the date of the lease one hun-

dred and thirty-four miles of the road were substantially constructed, and thirty-one other miles were being constructed.

By the terms of the lease, the plaintiff was to finish the road and put the same in good repair throughout by January 1, 1882; but on October 1, 1881, the defendant, in consideration of the sum of eighty-seven thousand one hundred and fifteen dollars paid to it by the plaintiff, undertook to perform this covenant itself.

A covenant in the lease bound the defendant to maintain and operate the road and keep it in good repair. And upon the failure of the defendant to keep any covenant in the lease, the plaintiff may enter and take possession of the demised premises, and may have a receiver appointed with such power and authority as may seem best calculated to secure the performance and observance of the obligations imposed by the lease on the lessee.

The bill alleges that the defendant has failed to finish the road according to its undertaking, and that since February 20, 1883, it has failed to keep the same in repair, and that the cost of making such repairs, including two bridges over the North and South Santiam rivers, to replace those carried away by floods, will amount to one hundred and eight thousand four hundred and fifty dollars.

The defendant has also refused to pay the rent now falling due, and given notice of its intention to surrender the premises and cease to operate the road, upon the ground that the lease is void for want of power in itself to enter into any such contract.

Pending the decision on the application for the injunction, the defendant has been required to operate the road, and is now doing so in pursuance of said direction.

The defendant demurred to the bill for want of equity and because the plaintiff had an adequate remedy at law.

As a general rule a contract to build or repair will not be specifically enforced by a court of equity. It is said that if one wont build another will; and if there is any loss sustained the remedy is at law, for damages. And this is especially so as to contracts like the covenant in the present lease, to repair during a period of many years.

1885.]

Opinion of the Court—Deady, J.

The rule and the reason of it will be found stated and exemplified in the following cases, and particularly in the one from 1 Woolworth, in which Mr. Justice Miller has gone over the subject, with his usual thoroughness and good sense: *Ross v. The Union Pacific Ry. Co.*, 1 Woolworth, 26; *Stour v. The Great Western Ry. Co.*, 21 Eng. Ch. Rep., 48; *Stuyvesant v. Mayor of New York*, 11 Paige, 15; *Gibbs v. David*, 27 Eq. Rep. 373; Fry on Specific Performance, 36-40.

The application for the injunction is denied.

An order for the appointment of a receiver will be made, giving him authority to operate the road and apply the proceeds to the payment of current expenses and making repairs. And, if the plaintiff will ask for it, he may be authorized to borrow money on the security of the road, sufficient to put it in repair, and thereafter bring an action at law to recover the amount from the defendant.

WILLIAM REID v. JULIA McCALLISTER ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

APRIL 24, 1885.

1. ALLEGATION IN ANSWER IN EQUITY, WHEN EVIDENCE FOR THE DEFENDANT.—

When a defendant, in his answer, admits a fact stated in the bill, and then undertakes to avoid it by another fact, the admission is not qualified by the matter in avoidance, which is not deemed responsive to the bill, unless the admission and avoidance constitute but one fact or transaction, in which case the answer is deemed responsive to the bill and evidence of the whole statement, including the matter in avoidance.

Before DEADY, District Judge.

Mr. Ellis G. Hughes, for the plaintiff.

Mr. Henry Ach, for the defendant, Julia McCallister.

DEADY, J. This suit is brought to enforce the lien of a mortgage executed by the defendants, on November 25, 1879, on four hundred and eight acres of land in Marion county, as a security for a loan of seven thousand dollars to the defendant Hardin McCallister, the husband of the defendant Julia McCallister.

Opinion of the Court—Deady, J.

[April,

The bill was taken for confessed, as against the former, but the wife answered, alleging that one-half the premises belonged to her, and admitting that she signed the instrument, but only upon the false and fraudulent representation of the plaintiff's agent, who obtained her signature thereto and took her acknowledgment of the same, that the mortgage did not include her portion of the premises, but only that of her husband, and that she was an ignorant woman, and unable to read or write.

To this answer there was a general replication, and afterwards the case was heard on the pleadings without any evidence other than that contained therein.

The answer, so far as it is responsive to the bill, is evidence for the defendant making it; but if the defendant, by his answer, admits a fact alleged in the bill, and then sets up another matter in avoidance thereof, this matter in avoidance is not responsive to the bill, and his answer is not evidence of it. (*Clarke v. White*, 12 Pet. 190; *Tilghman v. Baldwin*, 494; *Randall v. Philips*, 3 Mas. 383; *McCoy v. Rhodes*, 11 How. 140; *Hart v. Ten Eyck*, 2 John Ch. 87.)

In this connection matter in avoidance is something subsequent to and distinct from, or *dehors* the fact admitted; but if the admission and avoidance constitute one single fact or transaction, the answer is evidence of both. (*Hart v. Ten Eyck*, *supra*, 88 and note.)

The plea of *non est factum* denies the execution of the deed by the defendant—puts the fact of execution in issue—and under it you may prove, because comprehended in it, that the defendant was imposed upon, and put his name to the paper under an erroneous impression as to its character or contents. (*Van Valkenbeg v. Rouk*, 12 John. 338; 2 Green. Ev. § 246; *Chitty's Plead.* 519; 2 Phil. Ev. 148.)

And so here the answer is competent, and until contradicted, sufficient evidence that the defendant put her name to this instrument under an entirely erroneous impression of its contents, which impression was designedly produced by the false representations of the plaintiff's agent.

The only conclusion from the premises is that the defendant Julia McCallister did not execute the mortgage, so far

1885.]

Opinion of the Court—Deady, J.

as her portion of the premises is concerned, and, as to that, the bill must be dismissed.

Afterwards the plaintiff had leave to reinstate the case and take testimony to prove the due execution of the mortgage, notwithstanding the averment in the answer to the contrary, which was done, and a decree given enforcing the lien of the mortgage upon the property of the defendant Julia McCallister.

EX PARTE RICHARD KOEHLER RECEIVER.

CIRCUIT COURT, DISTRICT OF OREGON.

MAY 4, 1885.

1. CORPORATION ACT—VESTED RIGHT THEREUNDER CANNOT BE IMPAIRED OR DESTROYED BY THE LEGISLATURE.—The power of the legislature to alter or repeal the general incorporation act of Oregon is qualified, so that it cannot thereby "impair or destroy any vested corporate right."
2. RIGHT TO A REASONABLE COMPENSATION.—A railway corporation, formed under the general corporation act of Oregon, has a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road, which the legislature cannot impair or destroy.
3. LEGISLATURE MAY PRESCRIBE RATES OF TRANSPORTATION.—The legislature may prescribe rates of transportation, and the same will be presumed to be reasonable until the contrary is shown, but the judiciary are the final judges of what is reasonable, or what "impairs" the vested right of the corporation to a reasonable compensation for its services.
4. DISCRIMINATION BY RAILWAY CORPORATIONS.—The legislature may prohibit any discrimination by a railway corporation between persons or places, unless the same is done to enable it to retain or secure business at a point or place where there are competing lines of transportation, and in such case it may charge less for a long haul than for a short one in the same direction, so long as the charge for the latter is reasonable.

Before DEADY, District Judge.

PETITION to the Court for instructions.

Mr. John W. Whalley, for the petitioner.

DEADY, J. On January 19, 1885, Mr. Richard Koehler was appointed receiver by this court, in the suit of *Harrison et al. v. The Oregon and California Railway Company et al.*, of the road of said company, comprising upwards of four hun-

dred miles of track, leading from Portland via the east side of Wallamet river to Ashland, near the southern boundary of this state, with a branch from Albany to Lebanon, and from Portland via the west side of said river to Corvallis.

On February 20, 1885, the legislative assembly of the state of Oregon passed an act entitled, "An act to regulate the transportation of passengers and freight by railroad corporations," which will take effect, by operation of the constitution, on May 21.

On April 23 the receiver presented a petition to this court, asking for instructions concerning his duty in the management of said property, in certain particulars covered or affected by said act, which he says he is advised by his counsel is unconstitutional and void.

The act is very verbose and unskillfully drawn, but, so far as it relates to the matters about which the receiver seeks direction, it may be briefly stated as follows:

1. The fare for the transportation of passengers shall, in no case, exceed 4 cents a mile.

2. All charges for transporting property shall be reasonable; but the rate charged on January 1, 1885, by any corporation shall be its maximum rate.

3. No "greater or less" compensation shall be charged one person than another "for like and contemporaneous service" in transporting property.

4. No rebate or drawback shall be allowed in any case, except when property is shipped for points beyond the limits of the state.

5. Pooling freight or dividing the earnings of "different and competing" railways is prohibited.

6. No greater rate shall be charged for carrying similar property a short haul than a long one, in the same direction.

Any person who violates any provision of the act is made liable to the person injured in treble damages and a fine of one thousand dollars.

So far as the act undertakes to fix the charges for carrying passengers and freight, it is claimed to be void, on the ground that it impairs the obligation of the contract of the state with the corporation, to the effect that the latter might

1885.]

Opinion of the Court—Deady, J.

prescribe and fix its own tolls and charges, contrary to section 10 of article I of the national constitution.

By section 2 of article IX of the constitution of Oregon it is provided that "Corporations may be formed under general laws. * * * All laws passed pursuant to this section may be altered, amended or repealed, but not so as to impair or destroy any vested corporate right."

The Oregon and California railway company was formed under the general corporation act passed pursuant to this constitutional provision on October 14, 1862, which act contains the following section:

Sec. 36. Every corporation formed under this act for the construction of a railway, as to such road shall be deemed a common carrier, and shall have power to collect and receive such tolls or freights for the transportation of persons or property thereon as it may prescribe. (Or. Laws, 532.)

In *Wells, Fargo & Co. v. The O. R. & N. Co.* (8 Saw. 614), this court held that this section only authorized the corporation to charge a reasonable compensation for the transportation of persons and property; but that so far it constituted a contract between the state and the corporation, the obligation of which it could not impair by any subsequent legislation.

This conclusion, of course, implies that the right or franchise of the corporation to demand and have a reasonable compensation for the carriage of persons and property is a "vested" one, within the meaning of the constitution of the state, and therefore cannot be impaired or destroyed by the legislature, under the power to alter, amend or repeal the general corporation act.

But it is admitted that the right of the corporation to fix its rates and fares is not absolute, and that, if necessary, the legislature may limit the same to what is reasonable. Nor, in my judgment, is the power of the legislature over the subject absolute. It cannot require the corporation to accept less than a reasonable compensation for its services. And while the presumption may be, and doubtless is, that any rate which the legislature may prescribe is a reasonable one, such presumption is not conclusive, and may be over-

Opinion of the Court—Deady, J.

[May,

come by evidence to the contrary in any case, when the question arises before the courts.

I am aware, that in what are called the Granger cases (94 U. S., 155-187), it was practically held that the action of the legislature in fixing the maximum rate of compensation for certain railways was conclusive of the question and could only be reviewed or reversed at the polls.

But in none of these cases, as I read them, was the power of alteration or repeal reserved to the state, qualified, as in Oregon, so that it could not be used "to impair or destroy any vested corporate right." And the contention of the corporations in those cases was, that although the state had reserved to itself the right to repeal, without qualification, still, the court ought, in justice and right, to so limit its operation as not to allow it to interfere with vested rights, as was suggested by Mr. Chief Justice Shaw in *Commonwealth v. Essex Company* (13 Gray, 239). But the court refused to do so, and held, in effect, that under the unqualified power of repeal reserved to the state the legislature might deal with the subject as it pleased, even if it deprived the corporation of all right to compensation for services in the future, and there was no appeal from its action except to the polls; and that if the business and property of the shareholders was thereby destroyed or rendered valueless, they must blame themselves for engaging in a corporate enterprise under such precarious conditions.

Admitting, then, that the legislative assembly has the power to prescribe a maximum rate for the carriage of persons and property, and that such rate is presumed to be reasonable until the contrary is shown, I proceed briefly to consider the matters concerning which the receiver desires instruction.

And first as to the provision fixing the rates for carrying passengers.

There is no sufficient showing that the rate prescribed is not reasonable. The only distinct allegation in the petition to the contrary is that "the actual cost" of carrying "passengers on many portions of the road is in excess of the maximum rates allowed" therefor. But what the effect is

1885.]

Opinion of the Court—Deady, J.

upon the receipts for passenger traffic on the road, as a whole, does not appear, and probably cannot be definitely ascertained except by experience.

It is commonly understood that now and prior to the passage of the act, the fare between Portland and Albany, Lebanon and Corvallis was four and one-half cents a mile, between Albany and Roseburg six cents, and between Roseburg and Ashland seven cents; and on mileage tickets between Portland and Oregon city two cents a mile, between Portland and Albany and Lebanon three cents, and all other points four cents a mile.

Owing to the increased cost of operation and the limited population and travel, it is probably true that a rate which would be reasonable in the Wallamet valley would not pay expenses to the south of it. But if the legislature, in fixing the rate, think proper to make it uniform over the whole line, so as to make the more wealthy and populous portion of the state contribute to the locomotion of the inhabitants of the southern portion thereof, I am not prepared to say it has not the power to do so, or that the corporation can be heard to object thereto, so long, at least, as the compensation received by it for the carriage of passengers over its road, as a whole, is reasonable.

While the road remains in the hands of a receiver of this court, it is not desirable that there should be any conflict between its management and the policy of the state, except when the latter is clearly contrary to the legal right and substantial interest of the road.

For the present the receiver will be instructed to operate the road, in this respect, in subordination to the act, and if experience shall prove that the rate is insufficient to yield the road, as a whole, a reasonable compensation, the matter may be further considered.

As to the matter of long and short hauls, the question, although *prima facie* one of discrimination, directly involves the right to a reasonable compensation.

I assume that the state has the power to prevent a railway company from discriminating between persons and places, for the sake of putting one up or another down, or any other

Opinion of the Court—Deady, J.

[May.

reason than the real exigencies of its business. Such discrimination, it seems to me, is a wanton injustice, and may therefore be prohibited. It violates the fundamental maxim, which, in effect, forbids any one to so use his property as to injure another—*sic utere tuo ut alienum non lædas*.

The provisions of the act that I have condensed in paragraphs three, four and six aforesaid, are intended to prevent this practice.

But where the discrimination is between places only and is the result of competition with other lines or means of transportation, the case, I think, is different. For instance, the act prescribes a reasonable rate for carrying freight between Corvallis and Portland, or from either to points intermediate thereto. But Corvallis is on the river, and has the advantage of water transportation for some months in the year. The carriage of goods by water usually costs less than by land, and as water craft are allowed to carry at a rate less than the maximum fixed for the railway, they will get all the freight from this point unless the latter is allowed to compete for it. But, if to do this, it must adopt the water rate for all the points intermediate between Portland and Corvallis, where there is no such competition, it is, in effect, required to carry freight to and from such points at a less rate than that which the legislature has declared to be reasonable, or else give up the business at Corvallis altogether. And the same result would follow as to Salem and other points on the east and west side lines, where there is convenient access to water transportation.

If the legislature cannot require a railway corporation, formed under the laws of the state, to carry freight for nothing, or at any less rate than a reasonable one, then it necessarily follows that this provision of the act can not be enforced so far as to prevent the railway from competing with the water craft at Corvallis and other similarly situated points, even if, in so doing, they are compelled to charge less for a long haul than a short one in the same direction.

It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done

1885.]

Opinion of the Court—Dedy, J.

wantonly, for the purpose of putting the one place up or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the legislature has declared to be a reasonable rate, or abandon the field and let its road go to rust.

Nor can the shipper at the non-competing point or over the short haul complain, so long as his goods are carried at a reasonable rate. It is not the fault of the railway that the shipper who does business at a competing point has the advantage of him. It is a natural advantage, which he must submit to, unless the legislature will undertake to equalize the matter by prohibiting the carriage of goods by water for a less rate than by rail. And when this is done, the inequalities of distance as well as place may also be overcome, by requiring goods to pay the same rate over a short haul as a long one, and then the shipper at Ashland will be as near the market as any one.

As to the interchange of freights with the Oregonian Railway Company, the case stated in the petition does not seem to be one of pooling freights or dividing earnings, but rather a case of a long haul at a less rate than a short one in the same direction, to meet the contingency of river competition at Ray's or Fulquart's landing.

Pooling freights or dividing earnings is resorted to by rival and competing lines of railway as a means of avoiding the cutting of rates, which, if persisted in must result in corporate suicide. It is not apparent how a division of the earnings of two such roads can concern or affect the public, so long as the rate of transportation on them is reasonable. But assuming what is not admitted, that the legislature has the power to prohibit the practice, the Oregon and California and the Oregonian railways do not appear to be competing ones, but rather supporting ones—the latter serving as a feeder, branch or continuation of the former. Nor is the arrangement between them a pooling one, but simply one by which each carries for the other at a fixed price per ton per mile.

Opinion of the Court—Deady, J.

[May,

There is nothing in the arrangement which prevents the receiver from doing a "like service" for any one else on the same terms, and I have no doubt he would be glad to.

The receiver is instructed:

1. To carry passengers at a rate not exceeding four cents a mile on any portion of the road, and for as much less on the whole or any part thereof as he may think advisable;

2. To charge no more for the carriage of goods than the maximum allowed by the act, nor no more for a short haul than a long one in the same direction, except to and from points where the rate obtainable is affected by water transportation, in which case he may carry at as low a rate as the water craft do, without reference to the length of the haul;

3. To continue the interchange of freight with the Oregonian railway on the footing of the present arrangement as long as he may think advisable; and,

4. In the discharge of his duties, to otherwise obey and conform to the provision of the act.

The forgoing contains my present impression of the rights and duties of the receiver in the premises. But being *ex parte*, of course it is given subject to further consideration and correction. The receiver is instructed to obey the act, for the time being, except in the case of a long haul to or from a point affected by water transportation. If any one considers himself aggrieved by the action of the receiver in this particular, on application to this court leave will be given to bring an action herein against him for damages, so that the matter may be regularly and formally heard and determined.

As the question involved—"Has the corporation a contract with the state for the right to demand and have a reasonable compensation for the carriage of goods?"—is a federal one, it is proper that the action should be brought in this court.

1885.]

Opinion of the Court—Deady, J.

L. H. ALLEN v. ELIZA O'DONALD ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

MAY 8, 1885.

1. CREDITOR AND SURETY.—A creditor who has or acquires a lien on the property of his debtor as a security for his debt, is a trustee of the same for the benefit of his surety, if there be one, and if by any willful act of his such lien is lost or destroyed, to the injury of the surety, the latter is so far discharged from liability for the debt.
2. *IDEM*—BURDEN OF PROOF.—When a creditor relinquishes a lien he may have on the property of his debtor, in a suit to collect his debt from the surety, the burden or proof is on him to show that the surety was not injured by such relinquishment.
3. CONCLUSIONS OF LAW.—It is sometimes necessary and proper in equity pleadings to make deductions from the facts stated, that are more or less conclusions of law.

Before DEADY, District Judge.

Mr. M. W. Fechheimer, for the plaintiff.*Mr. William H. Holmes*, for the defendant.

DEADY J. On November 1, 1871, Thomas Cross, of Salem, Oregon, gave his promissory note to the firm of Allen & Lewis, of Portland, Oregon, for the sum of thirty thousand dollars payable in three years from date, with interest at ten per centum per annum, payable semi-annually, and to secure the payment of the same he and his wife, Pluma F., on the same day executed and delivered to said firm a mortgage on fifteen parcels of land situate in Marion county, and containing in the aggregate about three thousand three hundred and ninety acres; and on January 23, 1872, said Thomas Cross gave his promissory note to said firm for the sum of ten thousand dollars, payable one year from date, with interest at one per centum per month, and to secure the payment of the same he and said Pluma F., on the same day, executed and delivered to said firm a second mortgage on the real property aforesaid, together with the south half of block thirty in Salem, and certain parts of lots one, two and three, in block twenty, in said town.

On September 16, 1872, said Pluma F. died.

Opinion of the Court—Deady, J.

[May,

On January 22, 1876, said notes being still unpaid, said Thomas Cross and C. M. Cross, his then wife, executed and delivered to C. H. Lewis, a member of said firm, a conveyance, absolute on its face, of all said property subject to said mortgages, but upon the understanding and trust that said Lewis would farm and manage the same and apply the rents and profits thereof upon the debts secured thereon, and that he might with the consent of said Thomas Cross sell and dispose of the whole or any portion of the same and apply the proceeds in like manner.

On February 5, 1884, Thomas Cross died, soon after which the notes and mortgages aforesaid were indorsed and assigned by said firm to L. H. Allen of San Francisco, a member thereof.

On August 6, 1884, said Allen brought suit in this court to enforce the lien of said mortgages, alleging that there was then due on the first of said notes forty-five thousand one hundred and thirty-seven dollars and four cents, with interest at ten per centum per annum from December 22, 1881, and on the second ten thousand dollars, with interest from January 25, 1879, less one thousand six hundred and eighty-six dollars and thirty-five cents paid thereon.

Sundry persons, being the administrators and heirs of Thomas Cross and E. C. Cross, Frank R. Cross and P. May Wilson, the children and heirs of Pluma F. Cross, and C. H. Lewis are made parties defendants to the bill.

On January 20, 1885, an order was made taking the bill for confessed as against all the defendants except E. C. Cross and Frank R. Cross; and on March 10, 1885, they answered the bill, the latter by the former as his guardian.

The answer admits the making of the notes and mortgages and the amounts due on them as alleged in the bill, except the amount due on the first note, which is stated at forty-five thousand one hundred and thirty-seven dollars and four cents, with interest on thirty thousand dollars since December 22, 1881, instead of on the larger sum. It also admits the execution of the deed of January 22, 1876, to C. H. Lewis, but denies that it was made on any trust or understanding as alleged in the bill.

1885.]

Opinion of the Court—Deady, J.

The answer then states that at and before the execution of the two mortgages, and until her death, Pluma F. Cross was the owner in fee simple of the two parcels of real property described therein as a portion of the donation of Daniel Leslie, containing eighty acres, and the donation of F. S. Hoyt and wife, containing one hundred and thirty-one acres, and otherwise designated in the bill as parcels fourteen and fifteen; that prior to the execution of said mortgages Thomas Cross was indebted to the firm of Allen & Lewis for money theretofore advanced to him in the sum of thirty thousand dollars, which he was unable to pay, and to secure the payment of which said notes and mortgages were given; that at the urgent solicitation of her husband and the attorney of said firm, she was induced to join in said mortgage and thus "interpose her said lands as security only for said debt of her said husband."

Then follow certain allegations which are excepted to by the plaintiff as impertinent. Briefly they are as follows:

1. That it was stipulated in said mortgages that in default of payment of the notes, that they should be foreclosed as provided by law, and no other or different mode of sale of said lands was provided therein or contemplated by the parties thereto.

2. That after the death of said Pluma F. Cross, and in November, 1876, said Thomas Cross entered into an agreement with Allen & Lewis, in pursuance of which they sold and conveyed sundry portions of said mortgaged premises contrary to the terms and conditions of said mortgages, as follows: To J. I. Thompson, four hundred and thirteen and six one-hundredths acres, for three thousand eight hundred and thirty-four dollars; to C. C. Kennedy, one hundred and sixty and two one-hundredths acres, for one thousand six hundred and eighty dollars and twenty cents; to S. R. Scott, three hundred and nine and thirty-six one-hundredths acres, for three thousand and eighty dollars; in all eight hundred and eighty-two fourty-four one hundredths acres for eight thousand five hundred and ninety-four dollars and twenty cents, which land was then worth and would have sold under ordinary circumstances for twenty thousand dollars;

that in making said sales said parties expended fifteen hundred dollars in surveys, commissions and agents, and wrongfully charged the same to the proceeds of said sales; that no part of said proceeds were ever credited on said notes or mortgages, and that said sales were made without the consent of the defendants.

3. That the said lands of Pluma F. Cross were, at the time of said sales, and now are, worth not more than ten thousand dollars, and the premises considered, the same ought to be released and discharged from the operation and effect of said mortgages.

It appearing from the allegations thus excepted to, that the creditors, Allen & Lewis, voluntarily disposed of a portion of the debtor's property, on which they had a lien for their debt at a loss or sacrifice of not less than ten thousand dollars, a sum equal to the value of the property which the defendant's mother mortgaged as a security for said debt, they claim that the same is discharged from the operation of the mortgage, and that, therefore, such allegations constitute, as to them, a good defense to the bill.

The argument in support of the exceptions is, that admitting the sale of a portion of the debtor's property at a loss, the conclusion that the property of the surety is therefore released from the effect of the mortgage does not follow, because all the property included in the mortgage is not sufficient to satisfy the debt by more than ten thousand dollars, and therefore it can make no difference to these defendants whether such sum was lost by this disposition of the debtor's property or not. They are not injured in any view of the case, because after making due allowance for this loss their property will still be required to satisfy the debt.

It is admitted that Mrs. Cross was only a surety in this transaction for the debt of her husband, and it is not disputed that if the creditors' relinquished their lien on any portion of the debtor's property included in the mortgage without reducing the debt in an amount equal to the value thereof, that the property of the surety is so far discharged from the lien thereof.

This rule is the result of equitable principles inherent in

1885.]

Opinion of the Court—Deady, J.

the relation of principal and surety, which require that the property of the former pledged to the creditor for the payment of his debt, shall for the benefit of the latter be applied to that purpose. A creditor with such a lien, is so far a trustee for all parties concerned and must not deprive any one of the benefit of it. Upon paying the debt the surety is subrogated to the right of the creditor in this respect, but if in the meantime the latter has done anything to impair the value of such right, the former is so far discharged from his liability. (Brandt on Suretyship, Sec. 370; Neff's Appeal, 9; W. & S. 43; *American Bank v. Baker*, 4 Met. 177; *Cummings v. Little*, 45 Maine, 187; *Hayes v. Ward*, 4 John Ch. 129; *Baker v. Briggs*, 8 Met. 129.)

In *Hayes v. Ward*, supra, Chancellor Kent says: "The surety, by his very character and relation as surety, has an interest that the mortgage taken from the principal debtor should be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. A mortgage so taken by the creditor, is taken and held in trust, as well for the secondary interest of the surety, as for the more direct and immediate benefit of the creditor; and the latter must do no willful act, either to poison it, in the first instance, or to destroy or cancel it, afterwards."

But it is not stated either in the bill or answer what is the value of the portion of the debtor's property still covered by the mortgage, and therefore it does not appear whether or not, the whole of it was sufficient, if disposed of at a fair value, to satisfy this debt, without recourse upon the surety property.

In round numbers there is now due on these notes not less than eighty thousand dollars. In the argument for the exceptions it is claimed that the whole property included in the mortgage is not sufficient to pay the debt by a much larger sum than the alleged value of the defendants' property. And if this is so, then the defendants are not injured by what they complain of, and the allegations excepted to would be no defense to the bill and be clearly impertinent. But the court cannot say judicially what this three thousand three hundred and ninety acres of land is worth. It cannot

Points decided.

[May,

assume that it is only worth seventy thousand dollars and not eighty thousand dollars, though it may not fetch either sum when put up at auction.

The rule seems to be that the burden of proof is on the creditor in a case of this kind, to show that the surety has not been injured by the transaction. (Brandt on Suretyship Sec. 370.)

It follows that the allegations excepted to are not impertinent but constitute a good defence to the relief prayed for as to these defendants. The plaintiff must either deny them by a replication or confess and avoid them by proper amendments to this bill.

The further point made in support of the third exception, that the matter excepted to is a mere conclusion of law, is not well taken. It is sometimes proper and convenient in equity pleading, as a means of indicating the relief to which the party considers himself entitled or the defense sought to be made, to make deductions from the facts stated, that are more or less conclusions of law. And this seems to be the character of this allegation.

The exceptions are disallowed.

H. L. E. MEYERS ET AL. v. F. N. SHURTLEFF.

CIRCUIT COURT, DISTRICT OF OREGON.

MAY 13, 1885.

1. DUTIABLE VALUE OF IMPORTED MERCHANDISE—VALUE OF COVERING NOT TO BE INCLUDED THEREIN.—Section 7 of the Act of March 3, 1883 (22 Stat., 523), not only repeals section 2907 of the R. S., authorizing the value of the "covering" to be added to the wholesale price of imported merchandise for the purpose of ascertaining its dutiable value, but positively prohibits the value of such "covering" from being estimated as a part of such dutiable value, and therefore the value of barrels in which Portland cement is imported cannot be added to the wholesale price of the latter as an element of its dutiable value.

Before DEADY, District Judge.

Mr. Erasmus D. Shattuck and *Mr. Robert L. McKee*, for the plaintiffs.

Mr. James F. Watson, for the defendant.

1885.]

Opinion of the Court—Deady, J.

DEADY, J. This action is brought by the plaintiffs to recover the sum of six hundred and twenty-six dollars and seventy-one cents, alleged to be an excess of duties paid to the defendant as collector of this port.

It is stated in the complaint that on September 10, 1884, the plaintiffs imported from London to this port one thousand and seventy-three and one-third tons of Portland cement, contained in six thousand four hundred and thirty-nine barrels, and of the value, at London, of three thousand one hundred and thirty-three dollars and thirty-four cents; that said "barrels were only coverings or holders, and only the usual and necessary outside packages for the transportation and protection of the cement contained therein, and were and are of no commercial value after the removal of the contents thereof; that said barrels were not of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods, to wit: cement to the United States."

The complaint then states in detail the entry of the cement at the custom house, and the valuation of the barrels as a part of the dutiable value of the cement and the imposition of a duty of twenty per centum thereon, amounting to six hundred and twenty-six dollars and seventy-one cents, which the plaintiff, on October 3, 1884, paid under protest, and that said barrels were not dutiable; the subsequent appeal to the secretary of the treasury, and his affirmation of the action of the collector.

The defendant demurs to the complaint, for that it does not state facts sufficient to constitute a cause of action.

By the schedule A of the act of March 3, 1883 (22 Stat., 493), "Cement—Roman, *Portland*, and all others," imported from foreign countries, is made subject to pay a duty of "twenty per centum *ad valorem*."

The rule prescribed for the government of the collector of customs, in ascertaining the dutiable value of imported merchandise for the purpose of estimating the *ad valorem* duty to be levied thereon, has for the past twenty years, within certain limits, been constantly changing.

From the act of July 31, 1789 (1 Stat. 41), to that of

March 1, 1823 (3 Stat. 732), the rule was that the value of "outside packages" should not be considered a part of the cost of the goods. From the latter to the act of June 30, 1864 (13 Stat. 217), the law appears to have been silent on the subject.

By section 16 of the act of August 30 1842 (5 Stat. 563), "the actual market value or wholesale price" of the article imported, "at the time when purchased in the principal markets of the country" from whence imported, together with all costs and charges, except insurance, and including in every case a charge for commissions at the usual rates," is made "the true value at the port where the same may be entered upon which duties shall be assessed."

By section 1 of the act of March 3, 1851 (9 Stat. 629), the value of the article is required to be ascertained at "the period of exportation," instead of the "time" of purchase. By section 25 of the act of March 2, 1861 (12 Stat. 197), this time is changed to "the day of actual shipment," when the same appears from the bill of lading.

By section 24 of the act of June 30, 1864 (13 Stat. 217), "the actual value" of the goods was required to be taken when "on shipboard, at the last place of shipment to the United States," to be "ascertained by adding to the value of such goods at the place of growth, production, or manufacture, the cost of transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States, the value of the sack, box, or covering of any kind, in which such goods are contained, commission at the usual rate, in no case less than two and one-half per centum, brokerage and all export duties, together with all costs and charges, paid or incurred for placing said goods on shipboard, and all other charges specified by law."

By section 67 of the act of March 3, 1865 (13 Stat. 493), the collector is required "to cause the actual market value or wholesale price" of the goods "at the period of exportation to the United States in the principal markets of the country" from whence they are imported, "to be appraised,

1885.]

Opinion of the Court—Deady, J.

and such appraised value shall be considered the value upon which duty shall be assessed;" and section 24 of the act of 1864, *supra*, is expressly repealed, and also, "all acts and parts of acts requiring duties to be assessed upon commissions, brokerage, cost of transportation, shipment, transshipment, and other like costs and charges incurred in placing any goods, wares, or merchandise on shipboard."

By section 9 of the act of July 29, 1866, the pendulum was swung back again to the war tariff of 1864, so that "in determining the dutiable value of merchandise," the collector was required to add "to the cost or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country" from whence the same is imported into the United States, "the cost of transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which the shipment was made to the United States; the value of the sack, box, or covering of any kind in which such merchandise is contained; commission at the usual rates, but in no case less than two and one-half per centum; brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for exportation and shipment."

These sections of the acts of 1865 and 1866 were carried into the revised statutes, the former being section 2906 of that compilation, and the latter section 2907.

Section 7 of the act of March 3, 1883 (22 Stat. 523), repeals the latter of these sections as well as section 2908, and provides that "hereafter none of the charges imposed by said sections, or any other provision of existing law, shall be estimated in ascertaining the value of goods to be imported; *nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable; provided, that if any packages, sacks, crates, boxes, or coverings of any kind, shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one*

Opinion of the Court—Deady, J.

[May,

hundred per centum *ad valorem* upon the actual value of the same.”

It is understood that the action of the collector in this case was had in obedience to the instructions of the treasury department, acting under the advice of the department of justice, contained in an opinion of January 11, 1884, in which it is said that the only change affected by section 7 of the act of 1883, “as regards the basis on which *ad valorem* duties are to be estimated,” “is to exclude from such basis all costs and charges, which under the law as it previously stood, were required to be *added* to the current or actual market value or wholesale price of the merchandise in the principal markets of the country whence the same was imported, or of the country of production or manufacture, as the case might be. Thus the current or actual market value or wholesale price in these markets, which is to be appraised, is now made the *sole basis* for estimating such duties.”

The “costs” and “charges” of which these statutes speak, unless otherwise expressly stated, are the items of expense incurred by the importer in and about the purchase of goods, and afterwards and before their arrival at the port of entry. They do not, unless specially mentioned, include the cost of the sack, box, or covering in which the goods are usually contained and purchased.

And it may be admitted, that when the statute declares “without more”—without qualification—that the dutiable value of imported merchandise is “the actual market value or wholesale price” in the principal markets of the country whence the same is imported, that such value includes the cost of the sack, box, or covering in which it is usually contained and purchased. (*Cobb v. Hamlin*, 3 Cliff. 200.) The cost or expense of the covering usual and necessary for the protection and transportation of an imported article from the place of purchase is, as a matter of fact, an element of its value at such place.

And the only question in this case is, whether or not congress has said, without qualification, that the dutiable value of this cement is “the actual value or wholesale price” in London.

1885.]

Opinion of the Court—Deady, J.

And first, although the "actual value" of an article in the country where purchased, does, in the abstract, include the cost of the outside package, in which it is contained and placed for shipment, yet it is plainly inferable from the terms of the legislation on the subject, as above stated, that whenever congress has intended to include that expense in such value, as a basis for estimating duties, it has expressly said so.

To go no farther back than 1864, that act expressly provided that the "dutiable value" of goods should be their value on shipboard, to be ascertained by *adding* to their value at the place of growth, production, or manufacture, among other things "the value of the sack, box, or covering of any kind" in which they are contained. The act of 1865 simply made the "dutiable value" of goods their "actual market value" at the period of exportation, and expressly repealed section 24 of the act of 1864, requiring the value of the "covering" to be considered in ascertaining such "market value," while the act of 1866 simply restored the rule of valuation prescribed by the act of 1864.

From this statement of congressional action or legislative habit on this subject, it may fairly be inferred that the expense of the "covering" of imported merchandise is never to be included in ascertaining the "dutiable value" thereof, unless the statute expressly so provides. And, therefore, if the act of 1883 did nothing more than repeal section 2907 of the revised statutes (section 9 of the act of 1866), authorizing the value of such "covering" to be *added* to the "wholesale price," in determining the "dutiable value" of this merchandise, there would be no legislative authority for adding the value of the barrels to the value of the cement, as a basis of estimating the duty on the latter.

But when it is considered, that the act of 1883, not only repeals section 2907 of the revised statutes, authorizing the value of the barrel to be added to that of the cement, but also expressly prohibits the value of the former to "be estimated as a part of the value" of the latter "in determining the amount of duties for which it is liable," the case is too plain for argument. The mere statement of it is sufficient. There is no room for construction or difference of opinion.

Points decided.

[June,

The act of 1883 is both explicit and peremptory. It not only prohibits the "charges" or expenses incurred in and about the purchase of the goods and their shipment, from being added to their actual value or wholesale price, but it goes further, and apparently out of abundance of caution, adds—"nor shall the value of the usual and necessary sacks, crates, boxes or covering of any kind, be estimated as part of their (imported goods) value in determining the amount of duties for which they (imported goods) are liable."

The demurrer in this case admits that the value or cost of the barrels in London was estimated in ascertaining the dutiable value of the cement, and that the former is the usual and necessary covering for the protection and transportation of the latter.

It is impossible to sustain the legality of this valuation or the collection of the duties thereon, without absolutely ignoring this prohibitory clause in section 7 of the act of 1883, as seems to have been done in the opinion of July 14, 1884.

The demurrer is overruled.

WILEY C. SMITH v. WILLIAM EWING ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 1, 1885.

1. **CERTIFICATE OF PURCHASE UNDER PRE-EMPTION LAW.**—A certificate of purchase issued in due form, in favor of a pre-emptor, for land subject to entry under the pre-emption law, cannot be canceled or set aside by the land department for alleged frauds in obtaining it; but, in such case, the government must seek redress in the courts where the matter may be heard and determined according to the law applicable to the rights of individuals in like circumstances.
2. **INNOCENT PURCHASER.**—Sembles, that a purchaser in good faith and for a valuable consideration, from a pre-emptor, of the land included in the latter's certificate of purchase, takes the same purged of any fraud which might have been committed in obtaining said certificate.

Before DEADY, District Judge.

1885.]

Opinion of the Court—Deady, J.

Mr. John J. Balleray and Mr. J. M. Bower, for the plaintiff.

Mr. James F. Watson, for the defendant.

DEADY, J. This suit is brought by a citizen of Georgia to obtain a decree enjoining the defendants, who are citizens of Oregon, from trespassing on certain lands situate in Umatilla county, Oregon, and that any claim they may have thereto be declared null and void.

The defendants answered separately, and the cause was heard on exceptions to the answer of the defendant Ewing for impertinence.

It appears from the bill that on August 20, 1881, Arthur Webb settled, as a pre-emptor under the laws of the United States, on and improved the south half of the northeast quarter and the north half of the southeast quarter of section two, in township two north, of range thirty-two east, of the Wallamet meridian, and on the following day filed in the local land office at La Grande his declaratory statement therefor; that on July 29, 1882, after due publication of notice thereof, Webb made his final proof of such settlement and improvement to the satisfaction of the register and receiver of said office, and paid for the land at the rate of two dollars and fifty cents per acre, or three hundred and ninety-six dollars and twenty cents in all, for which he received from said receiver "a certificate of purchase and entry of said land, as by law required," which on July 31, 1882, was duly recorded in the county clerk's office; that on the same day, D. K. Smith purchased said land from said Webb in good faith, and for a valuable consideration, to wit: two thousand dollars, and took a conveyance thereof from said Webb, which was duly recorded on the same day; that on December 1, 1884, the plaintiff purchased said land from said Smith, subject to a mortgage thereon, given to the American Mortgage Company, of one thousand dollars, in good faith and for valuable consideration, to wit: one thousand dollass, and received a conveyance thereof from said Smith, and is now the owner and in possession of the premises, which are valuable for agricultural purposes and

Opinion of the Court—Deady, J.

[June,

reasonably worth five thousand five hundred dollars; that on or about July 10, 1883, the defendant Ewing wrongfully entered on the premises and built a dwelling house thereon, in which he has since and now resides, and cultivates about five acres thereof and cuts timber thereon; and that he denies the plaintiff's title and interest in said land, and disputes his possession thereof, and claims an estate or interest therein adverse to the plaintiff.

By his answer, the defendant Ewing admits that Webb erected a building on the premises, and filed a declaratory statement thereon and entered the same, as a pre-emptor, as alleged in the bill; but denies that the plaintiff or those under whom he claims were ever the owners of the premises, or that the plaintiff is in possession of the same; and alleges that on April 21, 1876, he being duly entitled to the benefit of the pre-emption law, settled on the premises under said law, and filed his declaratory statement thereon, and afterwards, on December 4, 1876, with the permission of the register and receiver, "duly changed said entry"—meaning, I suppose, said "declaratory statement;" that the settlement and entry of Webb was in "conflict" with that of Ewing's, as changed on December 4; that soon after the entry of the premises by Webb, but when is not stated, the defendant applied to the register and receiver to contest "the claim" of the former to the land included in his "declaratory statement and pretended entry upon the grounds above stated;" that thereafter such proceedings were had on such application that a contest was ordered thereon by the commissioner of the general land office, and a hearing had before the register and receiver on January 17, 1883, who thereupon decided that neither said Webb nor said Ewing had complied with the pre-emption law in the matter of residence, cultivation and improvement, and recommended "the cancellation of the filings and entries of both said parties by the commissioner;" that Webb appealed from said decision to the commissioner, who affirmed the same, and from there took the case to the secretary of the interior, where D. K. Smith, the grantor of the plaintiff, intervened for his rights as a purchaser from

1885.]

Opinion of the Court—Deady, J.

Webb, as alleged in the bill herein, and asked that a patent for the land included in the declaratory statement of the latter be issued to him; but the secretary denied said application, and on February 21, 1884, affirmed the decision of the commissioner, and that thereupon said filings and entries were cancelled by said commissioner, and "all rights thereunder wholly annulled;" and that by reason of such contest and cancellation the defendant became entitled under the law to enter said lands within thirty days from the date of said cancellation, and that he did within such period, to wit: on March 17, 1884, apply to said land office "to enter said tract as a homestead," which application was allowed; whereupon he "commenced to reside upon and cultivate and improve said land as a homestead," and has ever since continued to do the same.

The plaintiff excepts to so much of this answer as sets up the settlement and filing of Ewing on the premises in 1876, the contest thereabout with Webb in 1883, and the decisions thereon, and his subsequent entry of the land as a homestead, as impertinent.

The ground on which this exception is based is, that as soon as Webb entered the land at the local land office and received the certificate of purchase, it became his property—the legal title remaining in the vendor in trust for him until the patent should issue in due course of proceeding. That while any person interested may appear on the notice of final proof required by the act of March 3, 1879 (20 stat., 472), and contest the right of a settler to become a purchaser under the pre-emption law, and thereby prevent a certificate of purchase from being issued to such settler, or cause the same to be canceled on an appeal from the decision of the local office allowing the entry to be made, yet the government of the United States, having satisfied itself, through its local agents, in the manner provided by law, that Webb was entitled, under the pre-emption law, to purchase the land, and having thereupon sold it to him, cannot institute a contest in the land department between the purchaser and any one else, or even itself, to set aside, cancel or recall said certificate.

Section 2273 of the revised statutes gives the register and receiver the right to determine "all questions as to the right of pre-emption arising between different settlers," on "the same tract of land," saving the right of appeal to the commissioner and the secretary of the interior.

But at the date of Webb's entry and this alleged contest, Ewing's claim to the premises, under his filing in 1876, was forfeited for want of final proof and payment within thirty months thereafter (§ 2267, R. S.) He was then a stranger to the proceeding, and without interest in or relation to the land. No question could arise between Webb and him as settlers thereon, nor as to the right of either to pre-empt the same. By reason of his neglect to make his final proof and payment, the effect of Ewing's filing had ceased, and he had long lost his status as a claimant under the pre-emption law.

Therefore, this proceeding in the land department, that resulted in the attempted cancellation of Webb's certificate, must be regarded not as a contest under section 2273 of the revised statutes, between two settlers on the same tract of land, but as an *ex parte* proceeding instituted by the commissioner for the purpose of cancelling Webb's certificate, upon the suggestion of a stranger that it was fraudulently obtained. The fact that Webb saw proper to participate in it with a view of protecting his certificate does not affect its character in this respect.

Has the commissioner any such power? It is not given to him in terms by any act of congress that I am aware of. His right to pass upon conflicting claims to land under the pre-emption law seems confined to cases that come before him on appeal from the decision of the register and receiver, in case of a contest between two or more settlers under such law. Doubtless the commissioner may also refuse to give effect to a certificate and issue a patent thereon, when it appears from the face thereof, or the proof accompanying it, that it was issued contrary to law. But if the land is open to pre-emption and the proof is formally sufficient, as that it is made by the oaths of the proper and prescribed number of witnesses to the necessary facts, the

1885.]

Opinion of the Court—Deady, J.

commissioner cannot disallow the certificate, or refuse to issue a patent thereon, because the proof is not satisfactory to his mind, or because it is suggested to him that it is false. The law devolves the determination of that question on the register and receiver (R. S., section 2263), and it can only come before the commissioner on an appeal from their decision by a party to a contest before them.

When a certificate of purchase has been issued to a pre-emptor in due form, and no appeal has been taken from the decision or action of the register and receiver, the land described in the certificate becomes the property of the pre-emptor. He has the equitable title thereto, and has a right to the legal one as soon as the patent can issue in the due course of proceeding, and he can dispose of the same and pass his interest therein as if the purchase had been made from a private person. (*Carrol v. Safford*, 3 How. 460; *Myers v. Croft*, 13 Wall. 291; *Camp v. Smith*, 2 Minn. 155; *Cornelius v. Kissel*, 58 Wis. 237; *Bull v. Stiles*, 35 Ill. 309; *Sillyman v. King*, 36 Iowa, 207; *Moyer v. McCullough*, 1 Ind. 339.)

In *Carrol v. Safford* it was ruled that land held under a certificate of purchase from the United States land office was subject to state taxation as the property of the purchaser. In delivering the opinion of the court, Mr. Justice McLean said: "When the land was purchased and paid for it was no longer the property of the United States, but of the purchaser. He held it for a final certificate, which could no more be canceled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee."

In *Moore v. Robbins* (96 U. S. 530), it was held that a patent issued by the land department, acting within the scope of its authority, passes the legal title to the land, and all control of the executive department of the government over the title thereafter ceases; that if any wrong has been done to the United States the courts of justice are open to

it, as in the case of an individual, to have redress by cancellation of the patent or reconveyance of the land.

But whether a final certificate or certificate of purchase, issued in due form to a pre-emptor or other purchaser of public land, by the register and receiver of a local land office, is, within this rule, subject to the right of the commissioner or secretary to modify or set the same aside, upon a direct appeal to either of them, the supreme court has not decided, that I am aware of. The cases of *Lytle v. Arkansas* (9 How. 314), *Garland v. Wynn* (20 How. 6), and *Harkness v. Underhill* (1 Black, 316), have been cited and considered, and however they may bear on the question they are not, in my judgment, decisive of it.

To my mind, the certificate of purchase, subject to the condition mentioned, is within the reason of the rule laid down in *Moore v. Robbins* in the case of a patent. The issue of a patent or final conveyance on such a certificate is a mere ministerial act, of which the purchaser, in the case of private parties, might compel the performance.

Several of the state courts have decided that the certificate of purchase, when issued in due form, for land subject to entry, is beyond the power of the commissioner, otherwise than on a direct appeal from the register and receiver.

In *Perry v. O'Hanlon* (11 Mo. 585), the supreme court of Missouri held that a cancellation of a pre-emption certificate by the commissioner was a nullity. To the same effect is the ruling in *Prill v. Stiles* (35 Ill. 309); *Cornelius v. Kissel* (58 Wis. 241).

The statement in the answer as to the time and manner of instituting the alleged contest with Webb seems purposely obscure.

The hearing therein, before the register and receiver, appears to have been had in January, 1883, while it appears from a notice signed by the register of Webb's application to make final proof, addressed to Ewing at "Rio Vista, California," and annexed to a written brief filed by him herein, that he was living in California as late as August, 1882; so that, instead of being "soon after," it must have been more than a year after the certificate was issued to Webb that

1885.]

Opinion of the Court—Deady, J.

Ewing returned to Oregon and applied for leave to contest the former's entry.

But assuming, as I do, that the proceeding before the register and receiver was had on the direction of the commissioner without the authority of law, the cancellation of Webb's certificate of purchase and Ewing's subsequent entry of the premises under the homestead law, are mere nullities. This being so, the exceptions for impertinence are well taken. The matter embraced in them is altogether immaterial, and not a defense to the relief sought by the bill.

Neither does it appear from Ewing's answer that the second or changed filing of December 4, 1876, was for the land in question. The allegation is that on that day, with the consent of the register and receiver, he changed his declaratory statement, but how much or wherein is not stated. In the opinion of the secretary, which is annexed to the answer as an exhibit, however, it crops out incidentally, that the change consisted in throwing out the southwest quarter of the northwest quarter of the section, and adding thereto lots six and seven of the same. Nothing definite can be ascertained from this, without reference to the plat of the public survey of the section, from which it appears that the boundary line of the Umatilla reservation cuts off the southeast corner of it, leaving the southeast quarter of the southeast quarter a mere fraction containing three thirty-two one-hundredth acres, and known as lot six, and the northeast quarter of the southeast quarter also a fraction, containing thirty-eight nine-tenths acres, and known as lot seven.

Practically, then, the second or changed Ewing statement includes three of the four forty-acre tracts included in Webb's purchase, and lot six of the same section. Whether this was "a second declaration for another tract" within the prohibition contained in section 2261 of the revised statutes is a question. Certainly it was not for the same tract as the first filing, though not wholly for "another" or different one.

On the argument counsel for the plaintiff laid great stress

Opinion of the Court—Deady, J.

[June,

on the fact as he assumed it to be, that he was a purchaser in good faith for a valuable consideration, claiming that as the defendant had not answered the allegation of the bill to that effect, it was admitted to be true. But such is not the rule in equity pleading, though it would be very convenient if it were so. An allegation in a bill which is neither admitted nor denied by the answer, is still only an allegation, and must be proved before the plaintiff can have any relief based on it. If he wishes to prove it by the answer of the defendant, he can compel the latter to testify upon the point, by excepting to the answer for insufficiency.

The exception made in section 2262 of the revised statutes in favor of a *bona fide* purchase for a valuable consideration from a person holding a certificate of purchase under the pre-emption law is only against the forfeiture of the land denounced by that section, on account of the falsity of the oath thereby required of the settler as to his right to enter land under the pre-emption law and his purpose in doing so.

But in this case it was alleged that the pre-emptor never complied with the law as to residence, improvement and cultivation, and that the certificate of purchase was issued to him upon false or insufficient proofs of these facts. To such a case section 2262 does not appear applicable.

But at common law, where a party obtaining a conveyance of real property by a fraud practiced upon the grantor conveys the same to a third person who buys in good faith and for a valuable consideration, the latter will hold the property purged of the fraud. (*Fletcher v. Peck*, 6 Cranch. 133; *Somes v. Brewer*, 2 Pick. 184; *Deputy v. Stapleford*, 19 Cal. 302; 2 Story's E. J., section 1502; 2 Wash. R. P. 597.)

And in *U. S. v. Minor*, lately decided by the supreme court (5 S. C. Reporter, 836*), it is said that when a person obtains a patent for land under [the pre-emption law] by "fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity, and set aside as void if the fraud is proved and there are no innocent purchasers for value."

* Since reported in 114 U. S. 233.

1885.]

Points decided.

But whether this rule is applicable to a purchase made from a pre-emptor after entry and before patent issues, may be a question. Regarding the sale of the land, however, as completed when the proof of compliance with the law is made to the satisfaction of the agents of the vendor—the register and the receiver—and the purchase price paid to them, my impression is that an innocent purchaser for a valuable consideration from the party having the certificate of purchase takes the land and the right to the patent, purged of any fraud that may have been committed by his grantor in obtaining such certificate.

Of course, where the invalidity of the certificate is apparent on its face or is a matter of law, of which all persons are presumed to have knowledge, the purchaser would take with notice of such invalidity and be bound by it accordingly.

But be this as it may, my conclusion is that a certificate of purchase issued in due form, in favor of a pre-emptor, for land subject to entry under the pre-emption law cannot be canceled or set aside by the land department for alleged fraud in obtaining it; and that in such case the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals, under like circumstances.

The right of a party holding a certificate of purchase of public land and that of his grantee, is a right in and to property of which neither of them can or ought to be deprived without due process of law.

UNITED STATES v. WILLIAM C. GRISWOLD.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 10, 1885.

1. ACTION UNDER SECTIONS 3490-94 OF THE R. S.—An action brought by a private prosecutor under sections 3490-94 of the R. S., to recover damages and forfeiture for a violation of section 5438 of the R. S., is what was known at common law as a "popular" or *qui tam* action, and is under the sole and exclusive control of said prosecutor, subject to the restriction on his

Opinion of the Court—DEADY, J.

[June,

right to discontinue the same contained in section 3491 of the R. S., and his interest or share in any judgment obtained therein is his absolute private property, and the United States cannot compromise, remit or release the same by pardon or otherwise.

Before DEADY, District Judge.

Mr. James F. Watson, for the United States.

Mr. H. Y. Thompson, for the defendant.

Mr. James K. Kelly, for B. F. Dowell.

DEADY, J. By section 3469 of the revised statutes, it is provided as follows:

“Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised on the terms so offered, and upon the recommendation of the solicitor of the treasury, the secretary of the treasury is authorized to compromise such claim accordingly.”

The district attorney now applies for leave, under this section, to enter satisfaction of the judgment in this case in pursuance of an alleged compromise by the secretary of the treasury, of the sum or debt remaining due thereon, to wit: twenty-three thousand five hundred and seventy-six dollars for the sum of one hundred dollars.

It appears from the petition, that on May 27, 1877, the United States, by B. F. Dowell, commenced an action in this Court against William C. Griswold, under sections 5490-94 of the revised statutes, for certain forfeitures and damages, on account of the violation of section 5438 of said statutes, in knowingly making, presenting and obtaining payment from the treasury of the United States, in January, 1874, of certain false claims, commonly called “the Jesse Robinson claims;” that thereafter, on July 30, 1879, a judgment was duly entered in said cause in favor of the United States and against the said Griswold, for the sum of thirty-five thousand two hundred and twenty-eight dollars, together with costs and disbursements, amounting to two thousand eight

1885.]

Opinion of the Court—Deady, J.

hundred and seventy-five dollars and sixty cents; that divers sums have since been collected by execution and applied on said judgment, but there remains still due and owing thereon the sum of twenty-three thousand five hundred and seventy-six dollars; that on November 22, 1884, the secretary of the treasury, on the report and recommendation of the district attorney and the solicitor of the treasury, compromised said claim for one hundred dollars and the release of Griswold's interest in certain property situate in Salem, Oregon, and known as "the agricultural works;" that said Griswold has paid said sum of money and executed said release to the United States, and that the solicitor of the treasury, in a correspondence between himself and the district attorney, copies of which are annexed to the petition, has directed the latter officer to take the necessary steps to carry said compromise into effect.

In his letter of November 22, 1884, the solicitor of the treasury says: "It may be proper to state that I entertained serious doubts as to my authority to compromise such a claim or judgment, and accordingly the secretary of the treasury submitted the matter to the solicitor general. That officer determined the question in favor of the jurisdiction of this office, but added: 'Even if this conclusion was somewhat uncertain, I might still give the above advice, seeing that if it be mistaken the prosecutor may have relief by proceedings in court; whereas, if the advice was to the contrary and mistaken, Griswold could have no means of correcting it, that occurs to me.' In order that any rights that Mr. Dowell may suppose he possesses may be fully protected, and *if possible adjudicated*, you are hereby directed before taking the necessary steps to carry this compromise into effect, to *formally* notify him of your intention to do so, giving *him ample time to appear* in court and make such objection thereto as he may determine his interests require. As I do not desire that Mr. Dowell shall be so situated by your action or by that of this office, that he can hereafter successfully set up any claim for damages or otherwise, either in court or before congress."

In pursuance of this direction, the prosecutor, B. F.

Opinion of the Court—Deady, J.

[June,

Dowell, was notified of this application, and appeared and answered the petition, and was heard by himself and counsel in opposition thereto.

By his answer, the prosecutor objects to the entry of satisfaction, alleging that he was not consulted concerning the alleged compromise; that the action in which the judgment was given was a *qui tam* one, and that the one-half of said judgment belongs to him, and the United States has no power or authority to compromise his share thereof without his consent.

The prosecutor also alleges in his answer that the compromise ought not to be made for the further reason that Griswold has claims on the government of considerable value, specifying them in detail, and a lot in Salem, Oregon, that should be applied on the judgment; and concludes by saying that he has offered and now offers to take one-third of the balance due for the whole judgment."

The amount received on this judgment, except a trifling sum, was not made on executions issued thereon, but on a sale by a master, of property theretofore fraudulently assigned by the judgment debtor to his wife, in pursuance of a decree of the circuit court, in a suit conducted by the prosecutor to subject the same to the payment thereof, after tedious and costly litigation. (*U. S. v. Griswold and wife*, 7 Sawy., 311.)

The works spoken of as "the agricultural works," was mortgaged by the judgment debtor to his attorneys and others, after the action was commenced and before judgment therein, and the amount now due on said mortgages is probably more than the property is worth or will sell for. (*U. S. v. Griswold*, 7 Sawy., 296.) But the interest of said debtor in said property is the legal interest, as owner and mortgagor, and is therefore bound by the lien of the judgment from the date thereof, and if it is of any value, can be sold on execution, subject to the mortgages, and the proceeds of sale applied on the judgment.

This being so, the release of Griswold's interest in this property is an idle thing—a mere make-believe—that neither inconveniences him nor benefits the United States. There-

1835.]

Opinion of the Court—Deady, J.

fore, the only consideration for this compromise by which Griswold is to be absolutely released and discharged from the payment of a judgment against him of twenty-three thousand five hundred and seventy-six dollars, for and on account of money fraudulently obtained from the United States treasury, is this paltry sum of one hundred dollars. And further, the only reason for this extraordinary favor, not to an unfortunate, but to a fraudulent debtor, is, that he has no visible property, and it will save the trifling trouble and expense of issuing an execution on this judgment once in five years, for the purpose of keeping it in force.

In view of these facts, the transaction might more properly be characterized as a remission or pardon than a compromise.

However, I suppose the right of the United States to release the defendant from this judgment, rather than the justice or policy of the act, as between it and Griswold, is the real question now before this Court.

And first, what is the nature of the action authorized and regulated by §§ 3490-94 of the revised statutes, and what is the relation of Dowell to the same and the nature of his interest in the judgment given against the defendant therein?

Section 3490 of the revised statutes provides, that if any person not in the army or navy of the United States, "shall do or commit any of the acts prohibited" by § 5438 of said statutes, that is: among other things, knowingly make or present for payment any false claim against the United States, he shall forfeit and pay to the same the sum of two thousand dollars, and double the damages that the United States may sustain by reason thereof, together with the costs of suit, which forfeiture and damages shall be sued for in one action.

Section 3491 gives the district court of the district, where the offender may be found, jurisdiction of the action, and adds: "Such suit may be brought and carried on by any person, as well for himself as the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney."

Opinion of the Court—Deady, J.

[June.]

Section 3492 makes it the duty of the district attorney to be diligent in looking after and prosecuting such cases; and section 3493 enacts that “the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half of the amount of such forfeiture, as well as one-half of the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court.”

At common law, an action thus authorized to be “brought and carried on” by any person, “as well for himself as the United States,” was called a “popular” action, because given to the people in general; and when the penalty, as in this case, was given in part to the prosecutor and the remainder to the king or other public use, it was called a *qui tam* action, because the plaintiff therein was described as one who sues for the king as well as for himself—*Qui tam pro domino Rege, quam pro se ipso in hoc parte sequitur*. The action might be maintained in any case where a statute imposed a penalty for the commission or omission of a certain act, and gave the same, in whole or in part, to any one who would sue for it; and it was brought in the name of the person prosecuting it, and was exclusively under his control. (3 Black., 160; 1 Bac. Ab. 73; *United States v. Griswold*, 5 Sawy., 25; *Bush v. United States*, 8 Sawy., 327.)

The fact that the statute in this case requires the action to be brought in the name of the United States and provides that it shall not be discontinued without the consent of the judge and district attorney does not change its character in this respect. These are mere restrictions on the mode of exercising the right to bring and maintain the action, and do not affect any substantial interest of the prosecutor in the proceeding or the fruit of it. Indeed, although this action was brought at common law in the name of the prosecutor, it was always set forth that it was also brought for the benefit of the king or other public use, as well as him—

1885.]

Opinion of the Court—Deady, J.

self, and while the position of the parties is reversed here, and the action is brought in the name of the United States, it is brought for the benefit of the prosecutor as well as the government.

The provision concerning the discontinuance of the action is intended to prevent abuse of it, and is evidently borrowed from 18 Elizabeth, chapter 5, which prohibits a plaintiff in such an action from compounding or compromising the same without the consent of the court. (1 Bac. Ab. 84.)

By virtue of the statute prescribing the forfeiture and damages recovered in this case and authorizing any one to sue for them who would, the defendant Griswold became bound to pay the same to the prosecutor herein—the one-half for himself and the other half for the use of the United States. The law implied a contract to that effect, and the judgment obtained thereon is so far the private property of the prosecutor, and cannot be released or satisfied without his consent, no more than if it had been obtained in a private action on the bond of the defendant. (3 Black., 159.) For although the king might, by a pardon of the offender, bar or prevent a popular action before it was commenced, he could not by this or any other means known to the law interfere with its prosecution after it was commenced or release or dispose of the prosecutor's interest in the judgment therein. (6 Bac. Ab. 134; 4 Black., 399; Whar. C. P. P., sec. 528; 1 Bish. C. L., secs. 909, 911; *United States v. Lancaster*, 4 Wash. C. C. 64; *Shoop v. Commonwealth*, 3 Pa. St. 126; *United States v. Harris*, 1 Abb. U. S. Rep. 110; *Ex parte Garland*, 4 Wall. 381; 2 Hawkins P. C., ch. 37, secs. 34, 54.)

In *Ex parte Garland*, Mr. Justice Field, in delivering the opinion of the court, when speaking of the effect and operation of a pardon, says, "There is only this limitation to its operation—it does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment."

And if the pardon of the offender would not release him from the obligation and effect of this judgment, so far as the prosecutor's interest therein is concerned, much less can the secretary of the treasury compromise it away under section

Opinion of the Court—Deady, J.

[June,

3469 of the revised statutes. By its terms this section is confined to claims in favor of or debts due the United States. But the share or interest of the prosecutor in this judgment is a debt due him from the defendant therein—a claim in his favor, and not that of the United States, and is beyond and outside of the purpose and purview of the statute.

The case of *United States v. Morris*, 10 Whea. 246, cited by counsel for the judgment debtor, is not in point.

In that case and others like it, arising under acts relating to customs and navigation, the statute under which the customs officers claimed an interest in the forfeiture did not give them any absolute right therein until the same was reduced to money and paid to the collector, who was then required to pay a moiety of the same into the treasury and divide the remainder among the customs officers and informer, if there was one. The action was commenced and carried on by and in the name of the United States, and might have been discontinued at its pleasure. Besides, the act of March 3, 1797 (1 stat., 506; section 5292 R. S.), then in force, gave the secretary of the treasury full power to remit any forfeiture occurring under such acts without willful negligence or intentional fraud. The court held that the power of remission could be exercised by the secretary after judgment of condemnation and before the payment of the proceeds to the collector.

The confiscation cases (7 Wall. 454), also cited by counsel for the judgment debtor, only go to the point that an action commenced by the United States under the confiscation act of August 6, 1861, may be discontinued by it without the consent of the informer.

But the statute, under which Dowell brought this action, gave him one-half of the forfeiture and damages recovered therein absolutely and unconditionally; and for a very good reason. A forfeiture cannot occur under section 5438 of the revised statutes without the party incurring the same being guilty of both fraudulent intent and conduct, while a violation of the customs and navigation laws, involving a forfeiture or penalty, may and often does occur without fraudulent intent or even willful negligence. In such case, it is

1885.]

Opinion of the Court—Deady, J.

provided that the secretary of the treasury may remit forfeitures or penalties incurred without moral turpitude at any time before the same are paid to the collector, and all persons who contribute to the prosecution with the expectation of sharing in the result, do so subject to the exercise of this power. But in this case there is no reason founded either in the justice or expediency of the case, why the government should reserve to itself the power to remit the forfeiture or damages given to the prosecutor, as an inducement and reward for bringing and maintaining the action at his own costs and charges.

The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill-will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods, as the enterprising privateer does to the slow-going public vessel.

But if the United States could, by pardoning the offender, or remitting the penalty, or compromising the claim, deprive the prosecutor of his reward, after he had earned it, the statute would be a nullity. For no one would be foolish enough to incur the trouble and expense, or even the ill-will, incident to the prosecution of an action for any such forfeiture and damages, subject to the right of the treasury, on *ex parte* statements and personal solicitation, to remit the same or compromise his judgment after it was obtained.

Take this case for example. There were three jury trials and one hearing on error, in the first of which the jury stood eight to three for the plaintiff, and in the other two there were verdicts for the plaintiff for the sum of thirty-five thousand, two hundred and twenty-eight dollars each, on the defendant's written admission that he had obtained not less than sixteen thousand six hundred and fourteen dollars

Points decided.

[June,

from the treasury on false and fictitious vouchers, and satisfactory proof that he did so knowingly. As this court said in *United States v. Griswold*, 7 Sawy., 309: "The preparation and trial of the case covered a wide field of inquiry and controversy, extending over a period of nearly a quarter of a century and reaching from the Atlantic to the Pacific." The defendant paid his counsel over ten thousand dollars for their services, and when the prosecutor obtained judgment on the verdict, his taxable costs and disbursements amounted to two thousand eight hundred and twenty-one dollars and sixty cents. Then followed a suit in equity to cancel a fraudulent conveyance by the judgment debtor of property to his wife. This cost time and money, and the final decree, setting aside the conveyance and directing the property to be sold and the proceeds applied on the judgment was not entered until August 12, 1881—more than four years from the commencement of the action; and even then the department of justice, at the instance of the defendant, assumed to delay the sale of the property from time to time, so that the money on it was not realized until February, 1883.

And now, to release the defendant from this judgment and arbitrarily deprive the prosecutor of his share of this indebtedness, would, as was said by his counsel, on the argument, be "a shocking injustice." But I do not find that the law will allow it to be done.

My conclusion is, that the United States has no power over the prosecutor's share of this judgment, or right to release or compromise it in any way. It is his private property and exclusively under his control.

The application must be denied, and it is so ordered.

JOHN F. MILLER ET AL. v. VALLIER WATTIER.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 17, 1885.

1. REMOVAL OF CAUSE—SUIT ARISING UNDER A LAW OF THE UNITED STATES.
A suit by a vendee of the state under the act of October 26, 1870, pro-

1885.]

Opinion of the Court—Deady, J.

viding for the selection and sale of the swamp and overflowed lands granted to the state, by the act of March 12, 1860, to enjoin the commission of a nuisance on the land so purchased involves the question of whether said land was granted to the state by said act at the time of its selection by the state under said act of 1870, and therefore arises under said act of March 12, 1860, and is removable into this court under section 2 of the act of March 3, 1875, without reference the nature of the other questions that may be involved in it.

Before DEADY, District Judge.

Motion to remand to the State Court.

Mr. N. B. Knight, for the plaintiff.

Mr. George H. Williams and *Mr. H. Y. Thompson*, for the defendant.

DEADY, J. This is a suit in equity, brought by the plaintiffs in the state circuit court, for the county of Marion, to enjoin the defendant from maintaining a certain dam on Little Pudding river, on the ground that the same causes the water to flow back on the plaintiffs' lands, and is therefore a nuisance.

The defendant answered the complaint and then removed the cause to this court, on the ground that the controversy in the case arises under the act of congress of March 12, 1860, granting the swamp and overflowed land in Oregon to the state.

The plaintiffs now move to remand the cause for the reasons following:

1. It does not appear that a copy of the record has been filed in this court as required by law.
2. It does not appear that the case is one arising under the constitution or laws of the United States.
3. The court has no jurisdiction of the parties or subject matter.

In support of the first point, it is stated by counsel, and such appears to be the fact, that the clerk of the state court, instead of making a "copy" of the record for this court, has put together the original papers with copies of the journal entries and delivered them to the defendant for that purpose.

The act of 1875 (18 stat. 471) requires the party removing a cause to file "a copy of the record" in the court to

Opinion of the Court—Deady, J.

[June,

which it is removed. The law devolves on the party and not the clerk the duty of procuring and filing a copy of the record, but if the clerk refuses to furnish such copy when duly demanded, he may be proceeded against both civilly and criminally. But there is no virtue or convenience in the copy that the original does not possess, and the former is only required because it would be inconvenient if not improper to deprive the state court of the latter—the usual and proper evidence of acts done and suffered therein.

But the fact is the state court has voluntarily furnished the defendant with a portion of the record instead of a copy of the same for filing and use here, and I do not think the plaintiffs ought to be heard to object to it. They are not injured nor inconvenienced by it—in fine, it does not concern them. For all the purposes of removal and jurisdiction to hear and determine the cause, the original is equivalent to the copy, and in filing it the defendant has substantially complied with the statute.

It is not unlikely that the original papers were sent here by mistake of the clerk, and, if such is the case, and the clerk shall apply to have the error corrected, it will be proper to allow the originals to be withdrawn from the files of this court and copies thereof filed in their place.

There is no claim that this court has jurisdiction of the case by reason of the citizenship of the parties. It was removed on the ground that it arose under a law of the United States, and therefore it is not necessary to further consider the third point made in support of the motion to remand.

A statement of the facts contained in the proceedings is necessary to the consideration of the second point.

The plaintiffs allege in their complaint, that on March 12, 1860, twelve certain parcels of land, containing in all eight hundred and seventy-seven and sixty-seven one-hundredths acres, and described therein as being lots and subdivisions of certain sections, according to the public surveys, situate in Marion county, and constituting “a part of what is known as Lake Labish” (evidently a mere early phonetic spelling of the French, *La Biche*, or Deer lake), were and still are “swamp and overflowed”

1885.]

Opinion of the Court—Deady, J.

within the meaning of the act of congress of that date, and as such were by the same granted to the state of Oregon; that in pursuance of an act of the legislative assembly of Oregon, entitled "an act providing for the selection and sale of the swamp and overflowed lands belonging to the state of Oregon," approved October 26, 1870, the board of commissioners for the sale of school and university lands, on November 11, 1871, "duly selected said lands as *enuring* to the state of Oregon," under said act of March 12, 1860; that on April 9, 1872, said board duly sold said lands to the plaintiff, John F. Miller, "as swamp and overflowed," he then paying twenty per centum of the purchase price, and receiving from "said board his certificate of the purchase of the same," who afterwards sold an interest therein to the plaintiff, W. P. Miller; that in 1882 the selection of said lands, as aforesaid, was approved by an agent of the United States "specially appointed for the purpose of examining and reporting upon the character of the lands claimed by the state, as swamp and overflowed," but that patents have not been issued to the state for the same; that the defendant is the owner of a grist and saw mill on Big Pudding river in said county, and known as "the Parkersville mills;" that said mills are near Little Pudding river, "a constant stream" running through a portion of said lands, "in a clearly defined and distinct channel, where it has been accustomed to run from time immemorial, and near the northeastern extremity of said lands empties into Big Pudding river, a short distance above the defendant's mills;" that near said point the defendant "wrongfully and unlawfully maintains and keeps a dam about seven feet high across Little Pudding river, whereby its waters are raised and thrown over its banks flooding a scope of country," including said lands, "of about five miles long and from one-half to three-quarters of a mile wide, and rendering the same utterly worthless;" that if said dam was removed and said waters "allowed to flow in their natural channel," said "lands could be drained and reclaimed," and made valuable for hay and pasturage;" that the only practical method of draining said lands is through the channel of the Little

Opinion of the Court—Deady, J.

[June,

Pudding river, and so long as said dam remains "as it now is," they cannot be reclaimed, and the plaintiffs cannot perfect their title to the same; and that, although said dam has been adjudged a nuisance by the supreme court of the state and the defendant has been requested by the plaintiffs to remove the same, he still continues to maintain it, "to the great nuisance of plaintiffs' said lands."

By his answer, the defendant first simply denies *seriatim* the allegations of the bill, except the payment to the commissioners and his own ownership of the Parkersville mills, and then proceeds to answer them in detail.

And first, he alleges, that prior to 1850 William Parker took up and settled on donation number forty-nine, containing six hundred and forty acres, under the donation act of September 27, 1850, and on April 28, 1875, a patent was issued therefor—the east half to his widow and the west one to his heirs at law; that the southern part of the western boundary of said donation abuts on the northeastern end of Lake La Biche (Labish), and Little Pudding river enters said donation through said part of said boundary, and thence flows across the same where it has from time immemorial; that in 1850 said Parker erected a dam about six feet high across said river near where it enters said donation, whereby its waters were raised and set back on said lake, which is an expansion of the river, and constructed a race therefrom on said donation about eighty yards long, wherein to conduct the water of said river for manufacturing purposes, and built a saw mill at the lower end thereof; and that in 1852 he also built a grist mill near the same point, which was and ever since has been run by water flowing through said race; that such dam remains where and as it was first erected, and the water continues to flow through said race as it has since 1850; that said dam, race and mills are all on the west half of said donation, of which the defendant is the owner, together with the land on which they are situate and all the water power and privileges thereunto appertaining, and is now profitably engaged in running said mills by means of the water flowing through said race; that said mill property, with the water power and

1885.]

Opinion of the Court—Deady, J.

privilege aforesaid, is worth twelve thousand dollars, but if said dam is removed and the water diverted therefrom it will be of little value and the defendant will be damaged thereby not less than ten thousand dollars.

The answer then avers—

1. That the United States surveys were extended over these lands in 1852, including the usual subdivisions; that the alleged listing and locating of said lands is illegal and void, because the same was not made according to the legal subdivisions, and because the same and each parcel thereof is located in legal subdivisions, the greater part whereof is not wet and unfit for cultivation, and are therefore reserved to the United States by the act of March 12, 1860, and are now a part of the public domain.

2. That although the said lands were surveyed in 1852, and there was a regular session of the legislature of Oregon held in 1862 and biennially ever since, the alleged selection of said lands was not made until November, 1871, and therefore the act of March 12, 1860, does not apply to them; and that no selection of said lands has been approved by the commissioner of the general land office, nor has any patent been issued for the same to the state.

3. That although ten years have elapsed since the payment of twenty cents an acre to the state for said lands, no proof of any reclamation thereof has been made, nor have said lands been reclaimed, but they are now in the same condition, as to being wet and uncultivable, that they were at the date of the alleged purchase from the state.

4. That the plaintiffs have not nor never had the possession of said lands or any right thereto, nor have they or either of them any right, title or interest in or to the same.

5. That after the defendant heard that the plaintiff, John F. Miller, claimed said lands as swamp, he called on him and proposed some arrangement by which he could protect his property from injury resulting from the diversion of the water that supplied his mills, when said plaintiff told the defendant in substance and effect that such an arrangement was unnecessary, as the latter "held the key to the situation," and that no water could or would be drawn off

his lands without his consent, and that, relying on said statement, the defendant expended about eight thousand dollars in improving said property, wherefore plaintiffs are estopped, without the defendant's consent, from reducing the water above his dam.

6. That the defendant and those under whom he claims have been in the undisturbed, open and notorious possession and use of the premises, including said water power and privilege, for more than thirty years, and that he has acquired a right thereto by prescription.

7. That prior to 1850 and the construction of said dam, Lake La Biche (Labish) was a permanent body of water created by the expansion of Little Pudding river, and said lands were then covered with water, which the unobstructed channel of said river would not drain off and make fit for cultivation.

On the argument of the motion to remand, counsel for the plaintiffs maintained the proposition that it is not sufficient to give this court jurisdiction, that it is asserted in the answer or petition for removal that the case arises under a law of the United States, or that the construction of one might become necessary in the course of the trial of it, citing *Millingar v. Hartupee*, 6 Wall. 258, and *Gold Washing and Water Company v. Keyes*, 96 U. S. 199.

The proposition is not denied and the authorities support it, but this is quite a different case from either of those.

In the latter case Mr. Justice Wait says: "Nothing was stated (in the complaint) from which it could in any manner be inferred that the defendants sought to justify the acts complained of by any such authority (the constitution or laws of the United States)."

The petition for removal was the only pleading on the part of the company, and that stated its ownership, derived from the United States, of certain mining land that only could be worked by the hydraulic process, which required the use of Bear river and its tributaries, and asserted that it acquired the right to so use the river under certain specified acts of congress, the construction of which were necessarily involved in the determination of the case, without, as

1885.]

Opinion of the Court—Deady, J.

the chief justice says, stating any facts to show the right it claims, or "to enable the court to see whether it necessarily depends upon the construction of the statutes;" to which he adds: "The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for that is the precise question the court is called upon to determine."

The former case was a writ of error to a state court under section 25 of the old judiciary act, and the question was whether a right claimed by the plaintiff in error, and which was decided against him in the court below, was derived from "an authority exercised under the United States," to wit: an order of the United States district court. But it plainly appearing to the court that the order in question gave no such right, the writ was summarily dismissed, the chief justice saying as he did so: "Something more than a bare assertion of such authority seems essential to the jurisdiction of this court."

But in this case there is a distinct assertion in the complaint that the lands in question are swamp and overflowed, and that they were so on March 12, 1860, and that as such were still within the purview and operation of that act in November, 1871, and liable to be selected by the state as the grantee thereof, and that they were so selected and passed as such from the latter to the plaintiffs by purchase in 1872, all of which statements are denied and controverted by the answer of the defendant.

Admitting all this, counsel for the plaintiffs contends that "the matter in dispute" is the right of the defendant to maintain this dam as against the plaintiffs, and that such dispute does not arise under an act of congress, and its determination only involves the question of whether or not the dam is a nuisance.

Section 2 of the act of 1875 (18 Stat., 470) gives the right to remove from a state court to this court any suit "arising under the constitution or laws of the United States" where

Opinion of the Court—Dedy, J.

[June,

“the matter in dispute” exceeds the sum or value of five hundred dollars. “The matter in dispute” may be real or personal property, or damages for an injury to either or to the person, but in any case it must exceed five hundred dollars in amount or value. This is the money element of the jurisdiction; and the other is, that the suit in which this “dispute” is to be determined must arise under a law of the United States. The value of “the matter in dispute” and not its nature is to be considered. But if the suit brought for the determination of this “dispute” necessarily involves the construction or application of an act of congress, then such suit arises under such act. As was said by this court in *Hughes v. Northern Pacific Railroad Company*, 9 Sawy., 319: “A controversy which turns upon the existence, effect or operation of an act of congress, arises under such act, and a suit brought to determine the same, is a case arising under such act, within the meaning of the statute.”

An action may be brought to recover the possession of a tract of land. “The matter in dispute” in such action is the right to the land or the possession thereof. But that may depend on the legality or effect of a prior sale of the premises for delinquent taxes under an act of congress. In such case the action or controversy, without reference to the nature of the thing in dispute, arises under such act, whether invoked by the plaintiff or defendant, and is within the jurisdiction of the national courts.

Nor is it material that other questions, in no wise depending upon the laws of the United States, are involved in the determination of the case. As was said by Mr. Justice Harlan, in *Railway Co. v. Mississippi*, 102 U. S., 141—“It is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.”

1885.]

Points decided.

Admitting, then, all that the plaintiffs claim in the argument, as that the defendant cannot take advantage in this suit of any failure on the part of the plaintiffs to reclaim these lands or pay the remainder of the purchase price, on the ground that they are conditions subsequent to the grant or sale to the plaintiffs, for a breach of which no one can complain but the state; and that the question of whether the dam is a nuisance to these lands or whether the plaintiffs are estopped to complain thereof, or whether defendant has acquired a right to flow these lands by prescription, are questions that do not arise under any act of congress, still the plaintiffs' case, on their own showing, arises under the act of congress of March 12, 1860.

They make no claim to any right, title or interest in these lands except under this act, and in effect admit they have none other. Now if the facts do not bring them within the purview or operation of the act, as, if the lands are not swamp or overflowed within the meaning of the same, because the greater part thereof are not "wet and unfit for cultivation," or the right of the state thereto was lost by lapse of time long before the passage of the act of October 26, 1870, because the selection thereof was not made within two years from the adjournment of the session of the legislature next after the passage of the act of March 12, 1860, as alleged in the defendant's answer, then they are mere strangers to the premises, and cannot maintain any suit to abate or enjoin a private nuisance thereto or thereon.

So far, at least, then, this is a suit arising under a law of the United States, and removable to this court, under the first clause of section 2 of the act of March 3, 1875.

The motion to remand is therefore denied.

UNITED STATES v. ELLA M. ROSE.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JUNE 23, 1885.

1. CONCLUSIVENESS OF PATENT IN CASES OF FRAUD IN PROCEEDINGS BEFORE LAND OFFICE.—The doctrine of the conclusiveness of judgments and decrees of courts as between those who are parties to the litigation, is not appli-

Opinion of the Court—Sawyer, C. J.

[June,

cable to the United States in respect to proceedings before the land officers for obtaining patents for the public lands, in cases where fraud is practiced and where there was no contest, and the proceedings were wholly *ex parte*.

- 2 FRAUD IN OBTAINING PATENT.—Where a patent has been issued upon false and fraudulent representations made by the patentee to the land officers, supported by perjury, there having been no contest and the proceedings having been wholly *ex parte*, a court of equity will annul the patent, at the suit of the United States.

Before SAWYER, Circuit Judge.

Mr. J. M. Walling, for the complainants.

Mr. Charles W. Kitts, solicitor, and *Mr. Niles Searles*, of counsel for the defendant.

SAWYER, Circuit Judge. This is a suit in which, as in the case of the *United States v. The San Jacinto Tin Co.*, 10 Sawy., 639, upon an indemnity against costs given to the government by parties in interest, the indemnifying parties have been permitted to prosecute a suit in the name of the United States, against the defendant, to set aside a United States patent. The grounds relied on for annulling the patent, are, that it was obtained upon fraudulent representations made to the register of the land office, supported by perjury in the affidavits filed, stating the land to be non-mineral, vacant land, when it is alleged to have been, in fact, known mineral land, and to have been in the actual possession of private parties claiming, and working it, as mineral land, at the time of the entry in the land office, and of the issue of the patent. The fraud and perjury alleged constitute the grounds upon which it is sought to vacate the patent. In *United States v. White*, 9 Sawy., 125, although I entertained, at the time, grave doubts as to its applicability, I, finally, held upon demurrer, that the case was governed by the principle established in *United States v. Flint*, 4 Sawy., 51-3, affirmed in 98 U. S., 68, and in *Vance v. Burbank*, 101 U. S., 519, and dismissed the bill.

I thought it better, that the point should be settled by the supreme court for that, and all other contemplated cases, at that stage of the case. The value of the property turned

1885.]

Opinion of the Court—Sawyer, C. J.

out to be insufficient to give the supreme court jurisdiction. The question again arose in *United States v. Minor*, and in other cases, wherein the value was, also, insufficient to give the supreme court jurisdiction. And it was manifestly likely to arise in numerous other cases in this state. Still, being in doubt, and not fully satisfied as to the correctness of my former ruling, and the question being one of great importance and certain to arise in a great number of other cases, I invited the district judge to sit with me, and, though not fully satisfied on the point, I adhered to my ruling in White's case. The district judge, though somewhat in doubt, taking a different view of the question, we divided in opinion, and upon the request of the counsel for complainant, certified a division of opinion to the supreme court. Judgment was thereupon suspended in this, and all other cases involving the same questions then pending, until the point should be authoritatively settled in that case.

Towards the close of the last term, Minor's case was decided by the supreme court, and distinguished from the cases upon which I had relied; and the views adopted in White's and Minor's cases, were overruled. The decision in Minor's case, therefore, authoritatively, settles in favor of complainant the main question presented by the demurrer, and relied on by defendant in this case.

Several questions are made as to the sufficiency of some of the material allegations of the bill. However it might be on special demurrer, I think, upon the whole, that they are sufficient upon a general demurrer, which only goes to a want of equity in the bill. Assuming the defendant to be correct upon all points discussed, upon the authority of *United States v. Minor*, 114 U. S., 234, the demurrer must be overruled, and leave given to answer the bill, on or before the rule day in August; and is so ordered.

NASH v. EL DORADO COUNTY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JULY 6, 1885.

1. COUNTIES ARE CORPORATIONS SUBJECT TO BE SUED.—Section 4,000 political code, constitutes counties corporations, and sections 4,002-3 authorize them to be sued.
2. STATUTE OF LIMITATIONS—RESIGNATION OF SUPERVISORS, to avoid service of summons in a suit, does not prevent, or intercept the running of the statute of limitations.
3. LIMITATIONS—COMMENCEMENT OF SUIT.—A suit is commenced within the meaning of the statute of limitations by the filing of a complaint, without service of summons.
4. COUPONS—LIMITATIONS.—A right of action accrues upon coupons at the moment they fall due, and the statute of limitations commences to run upon coupons from their maturity.
5. INTEREST ON COUPONS.—Under section 1,917, civil code of California, where there is no special provision as to interest upon bonds and coupons, both the bonds and coupons bear interest, after maturity, at the ordinary legal rate, whether the coupons are detached from the bonds or not.
6. SPECIAL LIMITATION ACTS CONSTITUTIONAL.—The Legislature of the State of California has the power to pass special acts of limitation, applicable to a particular county indebtedness.
7. STATUTE OF LIMITATIONS AS TO BONDS AND COUPONS.—Coupons are regarded as part of the bonds, and the same limitation applies to coupons as that applicable to the bonds, of which they constitute a part. If an action is barred on a bond in four years after it matures, the statute runs four years on the coupons attached to the bond after the coupons become due; but the statute commences to run on the bond from its maturity, and upon the coupon from the time it becomes payable.

Before SAWYER, Circuit Judge.

Mr. B. S. Brooks, for the plaintiff.*Mr. A. L. Rhodes*, for the defendant.

SAWYER, Circuit Judge, delivering an oral decision: This is an action brought upon bonds of El Dorado county, issued by the county, in pursuance of the statute, for the purpose of aiding in the construction of the Sacramento Valley Railroad. The action is brought upon the bonds and the coupons for interest upon the bonds. The bonds, in this instance, have twelve years to run, the bonds and coupons
... for the payment of interest semi-annually. The

1885.]

Opinion of the Court—Sawyer, C. J.

bonds provide for the payment of interest at ten per cent. per annum, at specified times, semi-annually, "on surrender of the coupons for interest." Coupons were attached for interest running over the entire period, till the maturity of the bonds. The action is, in form, upon the bonds, and for interest, with no separate counts upon the coupons. The main question relied upon is, as to what, and for how long a period, interest can be recovered, in view of the statute of limitations. The demurrer goes to the amount of the recovery rather than the general sufficiency of the complaint. The object seems to be to get the ruling of the court as to what rate of interest the bonds and the coupons bear, after maturity—the interest called for in the bond being ten per cent. per annum; and as to the effect of the statute of limitations upon the coupons. That being the object, and these points having been argued, notwithstanding the difficulty of reaching the point by demurrer, I have no objection to expressing my views upon the subject now. It is claimed that the county is not liable to be sued at all. But the act of 1854, statutes 1854, page 45, authorizes counties to be sued. That act was in force until the adoption of the code. Section 4,000, political code, constitutes counties corporations, and sections 4,002 and 4,003 authorize them to be sued. Under that statute, and under the present codes, then, the county, since 1854, has been, and it now is, subject to be sued on its bonds. It is alleged, for the purpose of avoiding the statute of limitations, that, for a certain period during the running of the statute, on these bonds, there was no board of supervisors for El Dorado county, the members having all resigned for the express purpose of evading service of summons in a suit, so that no valid service could be made upon anybody. But, under the statute of limitations, no service is necessary to constitute the commencement of a suit. (Code Civ. Proc., sec. 350).

The suit is commenced within the meaning of the statute by the filing of the complaint; so there is no time that suit could not have been commenced, within the meaning of the statute, against El Dorado county. Suit could have been

commenced at any time, in such sense as to stop the running of the statute of limitations.

Coupons do not bear interest until they become due. I have no doubt that they bear interest from the date of their maturity, at the *legal* rate. It has been repeatedly so held by the supreme court of the United States. All of the cases decided in the supreme court of the United States, hold that the statute of limitations runs upon coupons from the date of their maturity. Though incidental to the principal agreement, they are independent obligations intended to be cut off from the bonds, and passed from hand to hand; and, it is held, whether cut off or not, that the right of action accrues upon them as soon as they fall due. But it is claimed by the complainant, here, that he has counted upon his bonds, alone, claiming interest not on an independent contract, but only as an incident to, and a part of the bond itself. The bonds provided that interest should be paid at specified times, semi-annually, as designated in the coupons attached. The money fell due at specified times, the bond not being yet due, and the right of action accrued, and the holder could commence an action upon the maturity of those coupons. They could be cut off and transferred separately as independent negotiable paper. If I were to execute a mortgage to secure, say, six thousand dollars borrowed money, giving three notes for two thousand dollars each, payable respectively, one of two thousand dollars in one year, one in two years, and one in three years, there can be no doubt that an action would accrue on each, as it matured. So, also, if instead of notes I should give a bond for six thousand dollars, payable two thousand dollars in one year, two thousand in two, and two thousand in three years, it would be the same as in the case of the notes. Each installment matures at a particular time, and at that time the payee is entitled to his money; the right of action accrues, and an action may be commenced at any time within the time prescribed by the statute of limitations after the right of action accrues. I have no doubt, therefore, that the right of action upon the coupons accrues upon the maturity of the coupons, and do not think the statute will be

1885.]

Opinion of the Court—Sawyer, C. J.

evaded in consequence of the coupons being for interest, and attached to the bonds. As to those coupons, then, against which the statute has run more than four years since their maturity before the commencement of the action, the action is barred under the statute of limitations. But, in this particular case, another point arises. A special act was passed in 1876 (statutes 1875-6, page 686, section 6), which suspended the running of the statute upon these particular bonds and coupons until the meeting of the next legislature; and in 1878 (statutes 1877-8, page 76, section 5), the same provision was again enacted, which suspended the running of the statute of limitations until the meeting of the following legislature—the two periods in the aggregate amounting to over three years. On each occasion the running of the statute is expressly suspended by these special statutes. It is claimed that it is incompetent for the legislature to pass a special law applicable to these cases alone. I think otherwise. I do not see any reason why the legislature might not pass a law suspending the running of the statute in these special cases as well as in any other general class of cases. The running of the statute was suspended during these periods, and that period must be added to the time prescribed by the general statutes. Adding this time, I believe all the coupons, except the last two on each class of bonds, are barred.

Another point requires notice. The claim is that these coupons do not mature until the maturity of the bonds. That is not the point decided in the cases relied on, cited from the United States supreme court. The point in *The City v. Lamson*, 9 Wall., 477, and in *Lexington v. Butler*, 14 Wall., 282, was that a coupon would be regarded as a part of the bond, and the same term would apply to the coupon that would apply to the bonds. That is to say, if the bond is not barred until twenty years after its maturity, the coupons will not be barred till twenty years after they become due, the same limitation being applied to the coupons that is applied to the bonds. See *Clark v. Iowa City*, 20 Wall., 587.

The question did not arise in these cases as to the time when

the statute began to run. It was only decided, that after the statute began to run on the coupons it had the same time to run that the bond had after its maturity. It is very clear that no other question was passed upon. But it is equally clear that in the subsequent decisions in *Amy v. Dubuque*, 98 U. S., 474, and in *Koshkonong v. Burton*, 104 U. S., 668, the statute begins to run at the maturity of the coupons, whether the coupons are detached or not; and on the bonds from the maturity of the bonds. The time on the coupons is the same as the time on the bonds. If an action on the bond is barred in four years after the maturity of the bond, an action on the coupons is barred in four years after their maturity.

There is another question as to interest, after maturity, and as to the rate. The bond is payable in twelve years, interest payable semi-annually, according to the coupons annexed. The interest on the bond specified in the instrument during the time is ten per cent. There is no provision as to interest after maturity. It is claimed that the bond, after its maturity, bears interest at ten per cent., or the rate prescribed in the bond. I do not think so. There is no contract in writing to pay interest at that rate, after the maturity of the bond. The contract specifies a specific time for payment, and there is no provision for paying interest until actually paid. It is payable at a specified time, and at such rate as prescribed. The contract assumes that the money will be paid when it falls due, and makes no provision for any other contingency. There is no contract in writing as to the rate of interest to be paid after the bond becomes due. Until the time it becomes due the rate of ten per cent. per annum prevails. There is no contract to pay interest on the bonds, or on the coupons, after they become due, and the interest is recoverable only at the legal rate, in accordance with the express provision of the code. Section 1,917 of the civil code provides that: "Unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the legal rate of seven per cent. per annum after they become due on any instrument of writing."

These bonds and coupons are instruments in writing,

1885.]

Opinion of the Court—Sawyer, C. J.

and they are governed by the provision of the code. There is no contract in writing as to the rate of interest which the bonds or coupons shall bear after they become due. They must, therefore, bear the legal rate of seven per cent. Section 1,919 provides in what cases *interest* shall bear interest, *according to the rate agreed upon as to principal*; and this case does not come within the provision.

The court granted a re-argument upon the question of interest on application of defendant's counsel, upon which the following oral decision was rendered:

Upon the re-argument, I do not see any grounds for changing the views before expressed. In my judgment the cases now cited by counsel for defendant from the California reports, arising upon statutes of the State, do not decide the precise points presented in this case. *Beale v. Amador Co.* 28 Cal., 449, is not like this. In that case there was only an equitable demand, growing out of a division of the county, which the statute imposed upon the new county an obligation to pay. The sum fixed by the legislature was specific, and the obligation extended no further than the law expressly required. Besides, it was only to be paid from time to time, when the fund raised should be sufficient, and not, absolutely, on a specific day. *Soher v. Calaveras Co.*, 39 Cal., 134, was similar to *Beale v. Amador Co.* in principle. So, as to interest on the coupons after maturity, the case of *Savings and Loan Society v. Horton*, 63 Cal., 105, is different. In that case, interest was charged upon interest after it became payable, due generally, and not upon coupons as separate contracts, at the *contract rate paid on the principal*, which was different from and larger than the legal rate. The court held this to be erroneous under section 1,919 civil code, before cited. I do not think it applies to this case.

The several points upon which an opinion is expressed are scarcely reached by the demurrer. But, I understand that new bonds are expected to be issued in pursuance of a recent statute, as soon as the amount of the liability of the county is judicially ascertained. Perhaps the views expressed will answer the purposes of the parties without further action. As no point is made as to the validity of

Points decided.

[July,

the bonds, the complaint, at least, states a good cause of action for the amount shown to be due not barred, and that, upon the views expressed, seems to be but a matter of calculation. So that the demurrer must be overruled, and it is so ordered, with leave to answer on or before the rule day in August.

HALL v. EL DORADO CO.

SAWYER, Circuit Judge. This case is similar to Nash v. El Dorado Co., and must be decided in the same way. Let a similar order be entered.

THE DUNDEE MORTGAGE TRUST INVESTMENT COMPANY v. SAMUEL B. PARRISH, CHIEF OF POLICE, ET AL.

THE AMERICAN FREEHOLD LAND MORTGAGE COMPANY v. J. F. GROVES, SHERIFF OF POLK COUNTY, AND EIGHT OTHERS, SHERIFFS OF CERTAIN COUNTIES.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY v. THE SAME.

CIRCUIT COURT, DISTRICT OF OREGON.

JULY 13, 1885.

1. MORTGAGE TAX LAW OF 1882.—On the question of whether this act of the legislature conforms to the constitution of Oregon, this court follows the judgment of the supreme court of the state in Mumford v. Sewell, 11 Or., 67, and Crawford v. Linn county, Id., 482; and on the question it is in conflict with the constitution of the United States, the ruling of this court in the Dundee Mortgage Trust Investment Company v. School District No. 1, 19 Feb. Rep., 359 and 21 Id., 151, is followed.
2. AN ACT FOR RAISING REVENUE.—The mortgage tax law does not levy any tax or raise any revenue, but only provides that when a tax is levied or a revenue raised that mortgages shall contribute thereto as land.
3. UNEQUAL ASSESSMENTS.—Where the law requires that mortgages shall be valued for taxation at their face value, and all lands at their "true cash value," and the assessor of a county wilfully and uniformly values the mortgages on lands therein at their face value, and the lands therein at only one-third of their cash value, such assessment is illegal, and the payment of the two-thirds of the tax thereby imposed on said mortgages may be enjoined.

1885.]

Opinion of the Court—Deady, J.

4. **TENDER OF PAYMENT OF TAX.**—A suit to enjoin the collection of a tax cannot be maintained in the courts of the United States, unless it appears that the plaintiff has paid, or offered to pay, so much of such tax as he concedes to be due or as may be shown that he ought to pay.

Before DEADY, District Judge.

Mr. John W. Whalley, Mr. W. D. Fenton, Mr. Raleigh Stott, for the plaintiffs.

Mr. Reuben S. Strahan, Mr. John Burnett, Mr. James F. Watson, Mr. Edward B. Watson, Mr. A. H. Tanner, Mr. H. Hurley and Mr. William B. Gilbert, for the defendants.

DEADY, J. These suits are brought by the plaintiffs, who are foreign corporations, to have the several defendants enjoined, as sheriffs of their respective counties, from collecting certain taxes levied by such counties upon sundry mortgages belonging to them, under the act of October 26, 1882 (ses. laws, 64), commonly called "the mortgage tax law," by the sale of the same.

Motions for provisional injunctions on the bills and demurrers thereto, on the ground of the invalidity of the law and the illegality of the tax, were argued and submitted together.

The bills are substantially the same, and from them it appears that the first two corporations are formed under the laws of Great Britain—the Dundee company having its principal office at the burg of Dundee, Scotland, and the London one, at London, England, and the third is formed under the laws of Connecticut, and has its principal office at Boston, Massachusetts, and each is formed for the purpose of loaning money in this state on note and mortgage, which notes are made payable and kept without the state at such principal offices respectively; that the Dundee company, as assignee of two former companies of that place, and in its own right is the owner of six hundred and forty-five thousand three hundred and seventeen dollars and twenty-nine cents in value, of such notes and mortgages for money loaned in this state prior to the passage of said act, except ninety thousand dollars thereof, upon which the various counties named in its bill levied a tax in 1884, amounting to nine thousand.

nine hundred and twenty-seven dollars and thirty-two cents; that the Connecticut and London companies are the owners of such notes and mortgages for money loaned in this state prior to the passage of said act upon which a tax was levied by the several counties named in their respective bills, for the years 1883 and 1884, as follows: The Connecticut company, of the value of two hundred and seven thousand three hundred and fifty-nine dollars in 1883, and of the value of two hundred and thirteen thousand two hundred and seventy-four dollars in 1884, and the London company of the value of one hundred and twelve thousand three hundred and sixty-eight dollars in 1883, and of the value of one hundred and fourteen thousand and twenty-seven dollars in 1884, upon the former of which a tax has been levied, by said counties, of seven thousand four hundred and fourteen dollars and sixty-three cents, and on the latter of three thousand nine hundred and fourteen dollars and seventy-seven cents.

The objections made by the bills to the validity of the law and the legality of the tax may be summarized as follows:

1. The act is void, because passed contrary to the constitution of the state, in these particulars: (a) it is an act "for raising revenue," but originated in the senate instead of the house, contrary to section eighteen of article IV thereof; (b) it was not read by sections on three several days in each house, as required by section nineteen of said article; (c) it involves double taxation and distinguishes between secured and unsecured notes and one and two county mortgages, and permits the indebtedness of residents to be deducted from their assessments and forbids the same in case of non-residents, contrary to section one, article IX, thereof; (d) it provides that debts and mortgages may be sold for the non-payment of taxes, the same as land; (e) it is a special or local law for the assessment and the location of taxes contrary to section twenty-three of said article four; (f) the plaintiffs' mortgages are assessed in said counties at the nominal value of the debt secured thereby, while the other lands situated therein are assessed at but one-third of their value, thereby creating unequal and ununiform taxation of the same kind of property contrary to section one of said article IX.

1885.]

Opinion of the Court—Deady, J.

2. The act is void, because in conflict with the constitution of the United States in these particulars: (a) it impairs the obligation of the contract whereby the mortgagor was to pay all taxes on the note and mortgage, and "in that it undertakes to change the situs of notes and mortgages," which prior to said act were owned and held elsewhere than in Oregon; (b) it impairs the negotiability of promissory notes secured by mortgage on real property; (c) the sale of the debt and mortgage involves the taking of private property without due process of law.

3. The assessment in Yamhill county is made or about to be made by the sheriff, and is therefore void.

The question of the validity of the act of 1882 was before the supreme court of the state in *Mumford v. Sewell*, 11 Or., 67, and *Crawford v. Linn County*, Id., 482, and also before this court in *Dundee Mortgage Trust Investment Company v. School District No. 1*, 19 Fed. Rep., 359, and 21 Id., 151.

In the cases decided in the state court it was held:

(1) The state may tax a mortgage in the county where recorded without reference to the residence of the owner; (2) An act authorizing such a tax does not impair the obligation of any contract between the mortgagor and the mortgagee; (3) The original bill on file in the secretary of state's office shows that the act was read on three several days, as required by section nineteen of article IV of the state constitution, and that is sufficient; (4) The act is not in conflict with section one of article IX, nor section thirty-two of article I thereof, concerning uniformity and equality of taxation; and does not exempt two county mortgages from taxation, but leaves them subject thereto under previously existing laws; (5) The legislature may fix the situs of personal property for the purpose of taxation, without violating the provision of the state constitution concerning equality of taxation; (6) The phrase "special law," as used in section twenty-three of article IV of the state constitution is synonymous with "private law," and whether a law is public or private depends on the subject matter; and (7) The act in question is a public one and therefore not a private or "special" one.

In the case before this court it was held:

1. Equity has jurisdiction to enjoin the collection of a tax levied under an invalid law, when necessary to prevent a multiplicity of suits; 2. The act in question does not impair the obligation of any contract between a mortgagor and mortgagee concerning the payment of the tax on the mortgaged premises or the debt secured thereby; the state is no party to such contract, and its power to impose and collect taxes on persons, property and business within its jurisdiction cannot be affected or restrained thereby; 3. The state may, so long as it does not trench on the constitution of the United States, tax all persons, property and business within its jurisdiction or reach; and whether any person, property or business is within its jurisdiction, is not a federal question, and must be determined by the state for itself.

This court also held in that case that the act was void because in conflict with section 1 of article IX of the state constitution, requiring uniformity in assessment for taxation, and also that the act was a special one, and therefore void, because in conflict with subdivision 10 of section 23 of article IV thereof; and that the enforcement by the state of a tax levied under such an act is a deprivation of property without due process of law, contrary to section 1 of the XIV amendment of the constitution of the United States.

This court will follow the decisions of the state court touching the validity of this act, when compared with the constitution of the state, and therefore all objections to the enforcement of this tax, on that ground, are out of place, and will be overruled without further consideration. *Greene v. Neal's Lessee*, 6 Pet. 291; *Stone v. Wisconsin*, 94 U. S. 181; *Town v. Perkins*, Id. 267; *Burgess v. Seligman*, 107 U. S. 33.

Conceding then that the judgments of the state court, in *Mumford v. Sewell*, and *Crawford v. Linn County*, so far as they declare the act to be in conformity with the state constitution, furnish the rule of decision in this case, and assuming that the rulings heretofore made by this court, in *Dundee Mortgage T. & I. Company v. School District No. 1*, so far as the same relate to federal questions, will be fol-

1885.]

Opinion of the Court—Dedy, J.

lowed, there are but two objections to the enforcement of the tax left for consideration: 1. The act is one for raising revenue, and therefore void because it did not originate in the house; and 2, admitting the law to be valid, the tax is illegal, because of the unlawful conduct of the persons who made the assessment of property in these various counties, whereby the plaintiff's mortgages are valued and taxed at two-thirds more than the lands in the said counties.

In *Mumford v. Sewell*, Supra, 71, Justice Waldo, speaking for the court, said: "Some of us have had considerable doubt whether the bill is not properly a bill for raising revenue, and therefore in violation of section 18 of article IV of the state constitution, because it originated in the senate," and concludes that the point is not sufficiently clear, as then advised, to warrant the court in declaring the law unconstitutional on that ground. In *Crawford v. Linn County* the point does not seem to have been mooted.

But I am clear that this is not a bill for raising revenue. True, it provides that when revenue is to be raised mortgages shall contribute thereto as land. But it does not authorize or provide for levying any tax or raising a cent of revenue. A bill for raising revenue or a "money bill," as it was technically called at common law, is a bill levying a tax on all or some of the persons, property, or business of the country for a public purpose; and the assessment or listing and valuation of the polls or property preliminary thereto, and all laws regulating the same, are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or raising a revenue thereon.

The constitution of the United States (section 7 of article I) contains a provision on this subject similar to the one in the state constitution. It reads: "All bills for raising revenue shall originate in the house of representatives, but the senate may propose or concur with amendments, as on other bills."

In speaking of this clause, Story, in his commentaries on the constitution (section 880), says: "And, indeed, the history of the origin of the power, already suggested, abund-

antly proves that it has been confined to bills to *levy taxes* in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue."

By the law in force at the passage of the act of 1882, personal property, including debts secured by mortgage, was listed to the owner in the county where he lived and real property in the county in which it was situated, and both were required to be assessed for taxation at their "true cash value." Or. Laws, p. 752.

By the act of 1882, this proceeding was so far changed that a mortgage on real property and the debt secured thereby is assessed and taxed to the owner thereof in the county in which the land lies, and is required to be valued at the full amount of such debt unless the property is not, in the judgment of the assessor, worth so much, in which case it must be assessed at its "real cash value."

The bills allege that the mortgages of the several plaintiffs are assessed by the assessors in the several counties at the nominal value of the debts, while the lands therein are only assessed at one-third of their value, thereby causing said lands to pay only one-third of the taxes that they ought to pay, and said mortgages two-thirds more than they ought to pay, which is not uniform but unequal taxation.

Upon the strength of the case of *Cummings v. National Bank*, 101 United States, 153, counsel for the plaintiffs insist that the discrimination against the plaintiffs' mortgages renders the assessment illegal.

In that case the officers charged with the valuation of property for taxation in Lucas county, where the bank was located, adopted a settled rule or system by which real and ordinary personal property was estimated at one-third of its value and moneyed capital at three-fifths of its value; and the state board of equalization increased the valuation of the bank shares to their full value.

The bank paid one-third of the tax and brought suit in the United States circuit court against the treasurer to enjoin the collection of the remainder. On consideration of the

1885.]

Opinion of the Court—Deady, J.

case in the supreme court, where it was taken by appeal, Mr. Justice Miller said, that "the bank had the same right under the laws and constitution of Ohio, to be protected against unjust taxation, that any citizen of the state has, and by virtue of its organization under the act of congress, it can go into the courts of the United States to assert that right."

The court held that the tax was illegal because the valuation of the property not only operated, but was intended to operate, unequally, in violation of the constitution of the state, which provided for the taxation of all property "by a uniform rule," "according to its true value in money," and for this reason, and not, as claimed by counsel for defendants, that the unequal assessment was in violation of the act of congress relating to the taxation of the shares of the national banks, it granted the relief and allowed the injunction.

But counsel for the defendants also insist that these cases are not within the rule laid down in *Cummings v. National Bank*, because it does not appear that the unequal assessments here complained of, were deliberately intended; and also, that before the plaintiffs can have relief on that ground it must appear that there was some common design or fraudulent conspiracy among the assessors of these various counties to make an unequal and illegal assessment to the prejudice of the plaintiffs.

But it is not necessary that there should be any actual conspiracy or expressed design to disregard the law in this respect on the part of the assessor to render an assessment illegal. Whenever the assessor of a district of a country as large as one of these counties, uniformly estimates real property at only one-third of the value he places on mortgages, it is impossible to attribute the result to the infirmity of human judgment, and the only conclusion possible in the premises is that it was deliberately and willfully done in pursuance of a settled purpose or rule on his part; and where the same thing occurs in a number of counties in various parts of the state, it is manifest that the action of the

assessors is not only willful and deliberate, but that it is the result of a general and well understood custom to substitute this conventional value of real property for "the true cash" one, which the statute requires.

Indeed, the practice is so universal and well known that the court might take judicial notice of it and safely assume that there is not an acre of land in Oregon that is valued for taxation at more than one-half its "true cash value," and that generally it is not valued at more than one-third of such value. Nor is it a sufficient answer to this to say, as counsel does, that land in Oregon does not yield an income of 6 per centum to its owners on its assessed value. For the annual income of land depends not alone or largely on its value, but its use and management.

Probably two-thirds of the taxable land in Oregon is unused, except as wild pasture. The owners of this property do not expect any income from it, nor are they entitled to any. But they are getting the benefit, year by year, of its enhancement in value, from the general growth and improvement of the country, to which they often contribute but very little.

But it is not probable that the money of the country yields an income of more than six per centum. Certainly, if it is loaned at legal interest and pays the usual taxes, it does not. Then there is always a considerable portion of this capital lying idle, but still subject to taxation. And yet in the nature of things, personal property, especially money, is more liable to escape taxation than land, and therefore it is, that in a country governed largely by land owners, like Oregon, there is more or less undervaluation of land, upon the specious plea, more understood than expressed, that this is the only way to keep even with the moneyed capital of the country and secure something like an equality of burdens between them.

But, be this as it may, the state scheme of taxation is not based on the income derived from property, but its "true cash value," and therefore it is useless to institute a comparison between the productiveness of land and money.

1885.]

Opinion of the Court—Deady, J.

Upon this phase of the case I am inclined to think the plaintiffs are entitled to relief against two-thirds of this tax, for if the allegations in the bills are not sufficient as to the deliberation and uniformity with which the land was undervalued by the assessor, there is no doubt but what they can be truthfully made so.

But one of the grounds of demurrer to these bills is, that so far as this phase of the case is concerned the plaintiffs are not entitled to relief in these suits, because it does not appear that they have paid or tendered so much of the tax as it appears they ought to pay.

This objection is well taken. In state railway cases 92 U. S. 617 the supreme court, in considering this question, say that before a party can maintain a suit to enjoin the collection of a tax he "must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all taxes assessed. * * * We lay it down with unanimity, as a rule to govern the courts of the United States in their action in such cases." To the same effect is the ruling in *National Bank v. Kimball*, 103 U. S. 733, and in *Huntington v. Palmer*, 7 Sawy., 335.

The assessment of the plaintiff's mortgages for 1884 in Yamhill county is made by the Sheriff under section 3 of the old territorial act of January 26, 1855 (Or. Laws, p 769, sec. 98), which authorized that officer to assess and collect a tax on any property which he might find had been omitted from the assessment roll, there being then no provision in the law for a board of equalization. It is suggested that this section was repealed by the act of October 25, 1860 (See laws 52) constituting the county judge, clerk and assessor a board of equalization, and the suggestion is not without force.

Opinion of the Court—Dedy, J.

[July,

It is also maintained that this section is void under the fourteenth amendment, because it deprives the party affected by the assessment of his property without due process of law, in that it makes the fiat of the sheriff, without notice to the owner, sufficient evidence that his property has been omitted from the assessment roll, and is of a certain value for the purpose of taxation, to which it is thereby made liable without any more to do.

Under the rule carefully laid down by the supreme court in *Davidson v. New Orleans*, 96 U. S. 104, I think this point is well taken. The listing and valuation of the property is done by the sheriff arbitrarily and without notice to the owner, and there is no provision for correcting his action in either respect, but the collection of the tax follows immediately upon such listing and valuation and by the sale of the property if necessary. Nor does section 4 of the same act (Or. Laws, p. 769, sec. 99), which authorizes the sheriff, upon application of the party interested, to correct certain errors of the assessor, apply to an assessment made by the sheriff under section 3; nor would it be sufficient to make it due process of law if it did. The party aggrieved would still be without notice of the proceeding until the tax was demanded or the property seized for non-payment thereof.

But this proceeding of the sheriff did not, and does not, excuse the plaintiffs from paying the proper tax on their mortgage in this county for the year 1884. Generally, it may be said, that the levy and collection of a tax is a proceeding in invitum, to which the taxpayer is only passively a party. But when he becomes an actor in the matter and seeks the aid of a court of equity, to protect him against some threatened wrong in the premises, the situation is changed, and the rule applies—he who seeks equity must do equity—which in this case means that the plaintiffs must pay or offer to pay whatever they ought to have paid if they had been duly assessed in 1884, before they can invoke the aid of this court to enjoin the sheriff from collecting the tax upon this illegal assessment.

The motions for injunctions are disallowed and the defendants sustained.

1885.]

Opinion of the Court—Deady, J.

UNITED STATES v. WILLIAM L. ADAMS ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JULY 27, 1885.

1. **LIABILITY OF A SURETY.**—The liability of a surety in an official bond is *stricti juris*; and he is not to be held responsible for the conduct of his principal beyond the scope of his undertaking, reasonably construed.
2. **ASSISTANT SECRETARY OF THE TREASURY—AUTHORITY OF.**—The assistant secretary of the treasury is not the deputy of the secretary, but only his aid, and his acts are not valid unless specially authorized by law or prescribed by the secretary (sections 161, 245, R. S.); but a letter written by him to a collector of customs concerning the deposit of money in his custody, will be presumed to have been written by authority of the secretary until the contrary appears.
3. **CASE IN JUDGMENT.**—In 1866, A was collector of customs at Astoria, Oregon, when and where he received a letter signed by the assistant secretary of the treasury, directing him to take forty-six thousand five hundred dollars in gold coin, theretofore received by him in payment of duties, and then in his custody, to San Francisco, and deposit the same with the assistant treasurer; in pursuance of which direction the collector sailed for San Francisco on the current steamer with said money in his trunk, and on the way twenty thousand dollars of the same was stolen therefrom, without any want of ordinary care and diligence on his part, a portion of which was afterward recovered, so as to reduce the loss to twelve thousand six hundred and ninety-sixty dollars and twenty-eight cents, for which the government sued the collector and his sureties on their bond; the defendants pleaded these facts in defense, and claimed they were not liable on the bond, to which the plaintiff demurred. *Held*: 1—that the carriage of this money to San Francisco was no part of the duty of A as collector (section 3639, R. S.), and therefore his sureties are not responsible for his conduct while so engaged; and 2—that in the transportation of said money, A was simply acting as a private carrier for the government, and is not liable on his bond for his conduct, or otherwise, except for the want of ordinary care and diligence.

Before DEADY, District Judge.

Mr. James F. Watson for the United States.*Mr. James K. Kelly* for the defendant Adams.*Mr. George H. Williams* for the defendants Parker and Gillette.

DEADY, J. This action is brought by the United States to recover off the defendants the sum of twelve thousand six

hundred and ninety-six dollars and twenty-eight cents, with interest at six per centum per annum, from September 18, 1873.

The complaint alleges that in 1865 the defendant William L. Adams was appointed collector of customs for the district of Oregon, and that on September 15 of said year he, together with the defendants, Charles L. Parker and Preston W. Gillette, as his sureties, executed their bond to the plaintiff, in the penal sum of fifty thousand dollars, conditioned as follows: "That the said Adams has truly and faithfully executed and discharged and shall continue truly and faithfully to execute and discharge all the duties of said office according to law;" that said Adams failed to keep the condition of said bond, in this: that of the moneys received by him as collector aforesaid, he failed and refused to pay over to the proper officers of the treasury department the sum of twelve thousand six hundred and ninety-six dollars and twenty-eight cents.

The answer of the defendants contains a specific denial of the material allegations of the complaint, except the execution of the bond, and two special pleas or defenses, as follows:

1. That on and prior to February 3, 1866, the defendant Adams, as collector of customs, at the port of "Astoria," Oregon, had in his custody forty-six thousand five hundred dollars in gold coin and one thousand dollars in currency, belonging to the plaintiff; that a short time prior to said date, said Adams had received instructions from the treasury department, through the assistant secretary thereof "to deposit said moneys with the assistant treasurer of the United States, at San Francisco," California, with advice that only the actual expenses incurred "in making the deposit and returning to Astoria would be allowed him;" that in obedience to said instructions, said Adams, on February 3, 1866, sailed from Astoria, with said money on the steamship Oregon for San Francisco, with the intention of personally depositing the same, as directed by the department; that said money was secured by said Adams on board the

1885.]

Opinion of the Court—Deady, J.

said vessel “in the best manner he was able to provide, and carefully watched and guarded by him, as much as he was able to do, during the voyage to San Francisco,” but that about February 6th, while off the coast of California, twenty thousand five hundred dollars of said gold coin was stolen from the trunk in which it was deposited, by some of the servants employed on said vessel, “during the temporary and necessary absence of said Adams from his room in which said trunk was kept, and without any fault, negligence or carelessness on his part;” that all of said money was afterwards recovered from the thieves and paid into the treasury of the United States, except the sum of twelve thousand six hundred and ninety-six dollars and twenty-eight cents, which is the money sought to be recovered by this action.

2. That said Adams, on February 3d, aforesaid, had in his possession, as collector of customs aforesaid, the money of the United States aforesaid, at Astoria, when and where he received instructions from the proper officer of the treasury, as aforesaid, to receive and carry said moneys, “as a special carrier” from the custom house in Astoria, to the assistant treasurer in San Francisco, which he then and there undertook to do, as aforesaid; “that as such carrier said Adams used all proper precautions to safely keep the said moneys so intrusted to him,” and that “the passage by steamer was the easiest and safest way of traveling with money from Astoria to San Francisco;” that on the passage twenty thousand five dollars of said gold coin was stolen from said Adams, as aforesaid, “without any fault, negligence or carelessness” on his part; that said Adams was not authorized to employ any person to assist him in transporting said money, and received no compensation therefor, except his necessary expenses from Astoria to San Francisco and return to Astoria;” and that through the efforts of said Adams all the money so stolen was recovered and paid to the proper officers of the United States, except the sum of twelve thousand six hundred and ninety-six dollars and twenty-eight cents, for which this action is brought.

To these two pleas the United States demurs, for that the facts stated therein do not constitute a defense to the action.

The argument in support of these pleas is this: 1. The defendant Adams, in transporting this money to San Francisco, was not acting as collector of customs, at Astoria or in the district of Oregon, but as a special or private carrier, at the request of the treasury department, and that as said carrier or bailee, he was only bound to the exercise of ordinary care and diligence, and is therefore not responsible for a loss by larceny that occurred, notwithstanding the use of such care and diligence; and 2, and although it should be held that Adams is liable for such loss either as a common carrier or collector, still he was not then engaged in the performance of a duty within the obligation of his bond or the purview of the statute regulating his duties thereunder, and therefore the sureties in such bond are not liable thereon for such loss.

The argument in support of the demurrer is, first, that the assistant secretary of the treasury had no authority to direct the defendant, Adams, to transport this money to San Francisco, and therefore when he removed it from the custom house and undertook to carry it to that place, he did so in his own wrong and contrary to the condition of his bond; but if the assistant had such authority, then said Adams in obeying his instruction was acting as collector, and in either case he and his sureties are liable on their bond for the loss accordingly, for the law is well settled that a larceny or robbery will not excuse the parties to a collector's bond for a failure to pay over all money that may have come into his hands as such collector, citing *United States v. Prescott*, 3 How. 578; *United States v. Morgan*, 11 How. 154; *United States v. Dashiell*, 4 Wall. 182; *Boyden v. United States*, 13 Wall. 17.

By sections 1 and 2 of the act of September 2, 1789 (1 Stat. 65, secs. 233-34, R. S.), organizing the treasury department, the secretary of the treasury was authorized to appoint an assistant secretary; and by section 13 of the act of March 3, 1849 (9 Stat. 396, sec. 245, R. S.), the provision

1885.]

Opinion of the Court—Deady, J.

for the appointment of such assistant was repeated with a specification of certain powers and duties, and concluding as follows: "who shall perform all such other duties in the office of the secretary of the treasury, now performed by some of his clerks, as may be devolved on him by the secretary of the treasury."

By section 5 of the act of March 3, 1857 (11 Stat. 220), the appointment of the assistant secretary was given to the president; and by section 3 of the act of March 14, 1864 (13 Stat. 26), it was further provided that "an additional assistant secretary of the treasury" should be appointed by the president, who shall perform all such duties in the office of the secretary of the treasury, belonging to that department, as shall be prescribed by the secretary of the treasury, or as may be required by law."

An "assistant" is one who stands by and helps or aids another. He is not a deputy, and cannot, therefore, act in the name of and for the person he assists, but only with him and under his direction, unless otherwise expressly provided by law. It is a question whether an assistant secretary, appointed under the act of 1849, could be even authorized by the secretary to do anything in his department, except such acts or duties as were performed at the passage of such act by some of the secretary's clerks. But no such restraint is imposed on the power of the secretary as to the assistant authorized by the act of 1864. Any duty pertaining to his office which the secretary may prescribe for him, such assistant may do; and it is highly probable that in practice the same rule was followed, as to the first assistant. Besides, it is hardly to be doubted that in 1849, some clerk in the treasury department was performing the duty of directing collectors as to the disposition of public money in their hands.

But I think that an act done by the assistant and within the authority and power of the department, must, until the contrary appears, be presumed to have been done under the direction of the secretary of the treasury. In *United States v. Tichenor*, 8 Sawy. 152, this court said that where the

president was authorized to reserve land for certain military purposes, the action of the secretary of war, to whose department the subject belonged and the duty pertained, would be presumed, in the absence of evidence to the contrary, to have been authorized by the president.

For the purpose, then, of this case, it must be presumed that the assistant secretary was acting in pursuance of the direction of the secretary, when he required the defendant, Adams, to take this money to San Francisco, and deposit it with the assistant treasurer at that place.

By section 15 of the act of August 6, 1846 (9 Stat.; 62-3; sec. 3616, R. S.), persons having public money of the United States, and not included in the directions contained in section 9 of said act (sec. 3615, R. S.), as was not the collector of the district of Oregon, might pay the same to the treasurer or assistant treasurer of the United States or such other depository, constituted in pursuance of the law, as the secretary of the treasury might designate; and by section 16 of said act (sec. 3639, R. S.) all public officers, including collectors of customs, "are required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered by the proper department or officer of the government to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the government which may be imposed by this or any other act of congress, or by any regulation of the treasury department made in conformity to law."

Admitting that the order of the assistant secretary was given under the direction of the secretary, and also that the latter had the authority to direct or employ the defendant, Adams, to carry this money to San Francisco, the sureties maintain it was a duty or service for the discharge or conduct of which they were in no way bound. The undertaking of the defendant, Adams, as collector, is stated in the

1885.]

Opinion of the Court—Deady, J.

condition of his bond as follows: "To truthfully and faithfully execute and discharge all the duties of his office according to law;" which duties were, according to section 6 of the act of 1846, *supra*, "to keep safely * * * all the public money collected by him" till the same was duly ordered "to be transferred or paid out;" and "faithfully and promptly" make such transfer or payment when required.

There is no provision here looking to the collector being engaged in the transportation or carriage of public money from one state or district to another for a distance of six or seven hundred miles.

It may be and probably is the duty of a collector, under this section, to transfer the public money in his possession when so ordered, by depositing the same with a depository in the town or place where his office is situated, or its immediate vicinity, and that his sureties are liable for any loss that may occur while he is so engaged, from either a larceny or robbery. To safely keep the public money under these circumstances may be a part of the collector's duty to faithfully "transfer" the same when required, and if so, the undertaking of the sureties makes them responsible for its faithful performance. But I doubt very much whether the duty of a collector "to transfer" public money in his possession, when required, includes the carrying or transportation of such money to any point beyond the vicinity of the custom house, even in his own district, as from Astoria to Portland.

The transfer and transportation of money from hand to hand and place to place are business transactions, and parties who undertake for a collector as sureties, expect and have a right to expect, that when the government engages in any such transaction, with reference to the money in the possession of their principal, it will do so in a business way and according to business methods.

At the time of this transaction, as well as before and since, the usual method on this coast of transmitting any quantity of coin, was by express; and that is the way this money should have been sent to San Francisco. Assuming that

there was no designated depository in Oregon at the time, the collector should have been instructed to transfer the amount to Wells, Fargo & Co. at Astoria, for transportation to San Francisco, who then would have been responsible for its safe delivery at the latter place. No business man in Portland would have thought of sending a clerk or messenger to San Francisco with forty thousand dollars in coin, or the tenth part of it; and the assistant secretary who directed it to be done in this case, unless he did so on the advice of the collector, is the primary cause of this loss and morally responsible for it.

The improvidence of this order appears to have soon become known to the department, for it was stated and admitted on the argument of the demurrer, that within a day or two after the collector had left for San Francisco, a counter command was received at his office, directing him to send the money by Wells, Fargo & Co.

The law is well established, that the liability of a surety is *stricti juris*; and therefore he is not to be held responsible for the conduct of his principal beyond the scope of his undertaking, reasonably construed. But the rights and interests of the public, to whom the surety has voluntarily become bound for the conduct of his principal, are not to be overlooked in the consideration of the matter, and therefore courts ought not to be astute or alert, as they sometimes appear to have been, to raise doubts and start quibbles, to save a surety from the otherwise legal consequence of his undertaking. Yet there is nothing in the nature or purpose of his undertaking that should make him liable beyond the fair and reasonable construction of its terms and the provisions of law relating thereto, considered in the light of the surrounding circumstances and with reference to the object of the transaction. (*United States v. Cheesman*, 3 Sawy. 429, and cases there cited.) Nor do the words of the statute (sec. 3639, R. S.) to the effect that the collector shall "do and perform all other duties as fiscal agent of the government" prescribed by law, include the duty of acting as agent for the transportation of this money, without some law

1885.]

Opinion of the Court—Deady, J.

directly imposing such duty on him or authorizing the secretary to do so in his discretion. This section, it must be noticed, includes assistant treasurers, receivers and all other custodians of public money, and the provision in question must be construed in each case with reference to the nature of the office and the duties primarily and ordinarily pertaining thereto. An assistant treasurer might very properly be required to receive, keep and pay out public money in any quantity and from any source, but not to act as a collector of revenue, either under the excise or tariff laws. Nor can a collector of customs be legally charged with the duty and his sureties with the responsibility of receiving, keeping and paying out sums of money not collected by him as duties on imports. And even if this could be done, it would require a still more expanded construction of the provisions to require a collector to act as a carrier of public money, at the risk of his sureties.

In *U. S. v. Singer*, 15 Wall. 122, Mr. Justice Field says: "The official bond of parties undoubtedly covers not merely duties imposed by existing law, but duties belonging to and naturally connected with their office or business, imposed by subsequent law. But the new duties should have some relation to or connection with such office or business, and not be disconnected from and foreign to both." And in the *U. S. v. Cheesman*, *supra* 431, Mr. Justice Sawyer in considering the effect of this very provision, says: "We think these words only intended to include such duties as naturally and ordinarily belong to the particular officer giving the bond, or have some obvious relation to such duties, and such as the sureties acquainted with the duties of the various public officers, as usually devolved on them by law, might reasonably be expected to contemplate at the time of executing the bond, as likely to be imposed upon their principal in case the exigencies of the government should require it; and not those duties which are usually imposed upon, and more appropriately belong to, an entirely different class of officers."

Neither is the defendant, Adams, liable on his bond as

Opinion of the Court—Sawyer, C. J.

[July,

The rule deduced from the cases, and adopted by Mr. Justice Blatchford, "is, that to constitute a 'final hearing in equity, or admiralty,' within the meaning of section 824, there must be a hearing of the cause on its merits; that is, a submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff, or libellant, has made out the case stated by him in his bill, or libel, as the ground for the permanent relief, which his pleading seeks, on such proofs, as the parties place before the court, be the case one of *pro confesso*, on bill or libel and answer, or pleadings alone, or pleadings and proofs. Nor does it detract from the force of this conclusion, that what is called an interlocutory decree, as distinguished from a final decree, is often entered as the result of a decision on a final hearing."

I shall adopt this conclusion as better supported by authority, as well as reason, as to the proper construction of the provision of section 824 in question. There was no replication in this case, and it was not at issue. There was no question of law submitted for consideration and determination by the court. The complainant, voluntarily, upon *ex parte* application, asked the court for leave to dismiss the bill; and the court granted the order, without looking into the pleadings, or deciding any point of law or fact. Had there been a final decree entered upon the ruling on the demurrer, without further pleadings, the hearing on the demurrer might well have been regarded as a "final hearing," contemplated by the act. (See *McLean v. Clarke*, xx The Rep., 36.) But the decree dismissing the bill was not a consequence of the decision on the demurrer. The item of twenty dollars, solicitor's fee, charged on the bill of costs filed by defendants, must, therefore, be rejected, and it is so ordered.

1885.]

Opinion of the Court—Deady, J.

THE FARMERS LOAN & TRUST COMPANY v. THE OREGON &
CALIFORNIA RAILWAY COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

AUGUST 3, 1885.

1. "SUBJECT" OF AN ACT AND "MATTER PROPERLY CONNECTED THEREWITH"—
TWO COUNTY MORTGAGE VOID. The clause in § 3 of the act of October 26,
1882 (Ses. Laws, 65) commonly called "the Mortgage Tax law," which
declares that all mortgages or other obligations whereby land in more
than one county "is made security for the payment of a debt, shall be
void," is a "matter properly connected" with the "subject" of the act,
and therefore not in contravention of § 20 of Article IV of the constitu-
tion of the state; and a mortgage executed by the defendant to plaintiff,
as trustee, of its road and property in several counties in Oregon, to
secure the payment of certain bonds of the same date, in violation
thereof, is void and of no effect.
2. CONSTRUCTION OF STATUTE. A plain provision of a statute cannot be con-
strued so as to exclude a particular case from its operation upon a sur-
mise or conjecture, however probable, that the legislature did not actually
contemplate or consciously intend its application thereto.
3. INSTALLMENT OF INTEREST—LIEN OF MORTGAGE MAY BE ENFORCED FOR. When
a debt payable at a future day, with interest, payable in the meantime,
at stated intervals, is secured by mortgage, and default is made in the
payment of an installment of such interest, a suit in equity may be main-
tained to enforce the lien of such mortgage, so far as such install-
ment is concerned, by a sale of so much of the mortgaged property as
may be necessary to pay the same; but if such property cannot be sold
in parcels without injury to the parties, or one of them, then the court
may order the whole of it sold, free from the lien of the mortgage,
and apply the proceeds on the whole debt according to its then value.

Before DEADY, District Judge.

Mr. William B. Gilbert, for the plaintiff.*Mr. Richard Williams & Mr. James K. Kelly*, for the
defendant.

DEADY, J. This suit is brought by the Farmers' Loan
and Trust Company, a corporation formed under the laws of
New York, against the defendant, a corporation formed
under the laws of Oregon, to enforce the lien of two certain
mortgages on the property of the defendant, by a sale of

the same, and to have the proceeds thereof applied on the several bonds secured thereby, according to their priority.

The bill was filed on January 29, 1885, and states, among other things, that on June 1, 1881, the defendant executed and delivered to Henry Villard, Horace White and Charles Edward Bretherton, as trustees, a first mortgage on its property, consisting of about three hundred and six miles of road running through various counties in the Wallamet and Umpqua valleys, together with the rolling stock, land grants, telegraph lines, and everything pertaining thereto with the franchise to operate the same, and the income and profits thereof, to secure the payment of certain bonds with the interest thereon, about to be issued by the defendant, at the rate of not more than twenty thousand dollars per mile of its road, then and to be constructed, for the purpose of completing the same to the California line; that said trustees accepted said trust, but thereafter, and from time to time, changes were duly made in said trustees, so that on July 7, 1883, the plaintiff became and now is the sole trustee thereof; that the defendant issued and disposed of under said mortgage, and of even date therewith, nine thousand and twenty bonds for the sum of one thousand dollars each, amounting in all to nine million, twenty thousand dollars, payable on July 1, 1921, with interest, at the rate of six per centum per annum, payable half-yearly, on January and July 1st of each year; all of which bonds are still outstanding and unpaid.

That in and by said mortgage it was, among other things, stipulated and provided as follows:

1. That the defendant will keep its road in good order and repair; (2) That if any interest coupon on any of said bonds shall remain unpaid, after due presentation, for six months, and such default shall not be waived, then the defendant will pay the principal of said bonds.

3. That in case the defendant does not keep its road in good order and repair or makes default in the payment of any interest coupon for six months, said trustees may take possession of said road and operate the same; and if it is considered necessary to take legal proceedings to “fore-

1885.]

Opinion of the Court—Deady, J.

close" said mortgage or to obtain possession of said "premises," they shall be entitled to a receiver, to be nominated by themselves.

The bill also states, that on May 28, 1883, the defendant having ascertained that the sum of twenty thousand dollars per mile would not be sufficient to complete its road, executed and delivered to the plaintiff, as trustee, a second mortgage upon all its property aforesaid, except so much of the land grant as pertained to the completed portions of the road, and subject only to the lien of the first mortgage aforesaid, to secure the payment of additional bonds with the interest thereon, about to be issued by the defendant, at the rate of not more than ten thousand dollars per mile of its road, then and to be constructed, for the purpose of completing the same as aforesaid; that the plaintiff accepted said trust and thereafter, on November 5, 1883, said second mortgage was duly recorded in the office of the county clerk of Multnomah county, and also in the several offices of the county clerks of the other counties in which said property is situate; that the defendant issued and disposed of under said mortgage two thousand, six hundred and ten of said bonds, dated April 1, 1883, for the sum of one thousand dollars each, amounting in all to two million, six hundred and ten thousand dollars payable on April 1, 1933, with interest at seven per centum per annum, payable half yearly, on April and October 1st, of each year; all of which bonds are still outstanding and unpaid.

That in and by said second mortgage it was stipulated and provided as in said first mortgage, as above stated.

The bill then alleged that the defendant "has failed to keep said road, rolling stock, equipment and premises in good order and repair, as required to said mortgage," and has failed to pay the interest falling due on the bonds secured by the first mortgage on January 1, 1885, amounting to two hundred and seventy-five thousand dollars, and on the bonds secured by the second mortgage, on April 1, 1884, and all the interest accruing on either of said bonds since said respective dates; that the defendant is insolvent and

wholly unable to pay its debts, and its property is "a very inadequate security" for the payment of the first mortgage bonds; and that the premises cannot be sold in parcels without great injury to the interests of the beneficiaries in said trusts.

The defendant demurs to the bill and for cause of demurrer shows:

1. That this suit is prematurely brought, because default in the payment of the coupons on the first mortgage bonds had not been made for six months prior to the filing of the bill herein.

2. The second mortgage is void, because made in violation of the provisions of § 3, of the act of October 20, 1882, commonly called the "Mortgage Tax Law," which provides—"All mortgages, deeds of trust, contracts or other obligations hereafter executed, whereby land situated in more than one county in this state is made security for the payment of a debt, shall be void."

In answer to the demurrer to the second cause of suit, counsel for the plaintiff maintains that the act of 1882 or this provision of it, is void, because in conflict with § twenty of article IV of the constitution of the state, which declares: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title."

The act in question is found at page 64 of the session laws for 1882. The subject of the act is the taxation of money loaned on real property, and as a means to this end it provides that it shall be assessed as land, in the county where the land is situate; and because it would be or was deemed to be inconvenient to administer the act in cases where money is loaned on land in two or more counties, it provides that thereafter a mortgage on land in more than one county shall be void; and this purpose is expressly mentioned in the title.

This act has been before the supreme court of the state on two occasions (*Mumford v. Sewell*, 11 Or., 67, and *Crawford v. Linn county*, Id., 482) and in its principal purpose

1885.]

Opinion of the Court—Deady, J.

and feature held valid. True, this particular clause has not been considered by the court, but if the legislature has the power to tax money loaned on land, in the county where the land lies, and as land, about which there is neither doubt nor question, it certainly has the power to provide, as a means to that end, that a mortgage shall not include land in more than one county, and if it does, it shall be void.

Abstractly considered, the legislature has plenary power over the subject, and may prohibit mortgages on land altogether, and even prohibit and make void all contracts for the payment of money at a future day. But an act for such, or any other purpose, must not embrace more than one subject, nor include matters having no necessary connection therewith. *Cooley, Con. Lim.*, 142.

What are "matters properly connected" with the "subject" of an act, is a question sometimes difficult to determine. But certainly a provision declaring two county mortgages void is sufficiently relevant and germane to an act, providing for the taxation of money, secured by a mortgage on land, particularly when, as a means to that end, such act limits all mortgages on real property to land in one county.

This sanction is a necessary, or at least a convenient means of securing obedience, to the declaration, that mortgages shall only include land in one county. And the former is as much a proper matter to be connected with the latter, as the provision common in registry acts, that an elder deed not recorded within the time thereby limited shall be postponed to a junior one, so recorded.

The provision is valid; and tried by it, this mortgage is surely void.

On the argument, it was suggested, that this class of mortgages is not within the mischief which the law was intended to remedy, and that the legislature could not have consciously intended and actually contemplated including them in its enactment. As a matter of fact this may be so, for it is not likely that the members of the legislature in the passage of this act were moved by any desire to shift the burden of taxation, in the case of a railway mortgage, from the

shoulders of the debtor to those of the creditor, as they certainly were in the case of mortgages generally. But I know of no principle of law or rule of construction that authorizes a court to limit or set aside the plain language of an act upon any such surmise or conjecture, however probable. The act declares that "all mortgages, deeds of trust, contracts or other obligations hereafter executed, whereby land situate in more than one county in this state, is made security for the payment of a debt *shall be void*."

The language of the provision is plain and unambiguous. It speaks for itself, and there is no room for construction. The legislature must be intended to mean what it has plainly said. In such a case the court is not at liberty to look elsewhere than the act for a possible or even probable legislative intention. (Cooley Con. Lim. 55).

At the following session of 1885, this act was amended (ses. laws 9) so as to take railway mortgages, thereafter executed, out of the operation of this clause, which is equivalent to a legislative declaration that it theretofore included them.

The mortgage is void, and no right can be asserted under it. The holders of the bonds mentioned therein are simply unsecured creditors of the defendant, without any lien on its property, and must rely on their bonds and the remedy which the law gives them thereon, to enforce the collection of their demands.

The objection made by the demurrer to the suit on the first mortgage bond is in abatement thereof. The demurrer assumes that the suit is brought to enforce the lien of the mortgage or foreclose it, as it is inaccurately termed, for the whole debt secured thereby. And as this cannot be done on account of a default in the payment of interest until the lapse of six months thereafter, the demurrer upon this theory of the case is well taken.

But the plaintiff in his bill does not claim that any portion of the debt secured by the mortgage is due, except the instalment of interest payable on January 1, 1885, amounting in all to two hundred and seventy thousand dollars.

1885.]

Opinion of the Court—Dedy, J.

But it also appears from the bill that the property is an inadequate security for the payment of the first mortgage bonds, and that the mortgaged property cannot be sold in parcels without great injury to the interests of the beneficiaries of the trust.

Where the interest on a debt secured by a mortgage is payable in yearly or half yearly installments and the principal at a future period, in case of the non-payment of any such installment of interest, a suit may be maintained thereon, to so far enforce the lien of the mortgage; and if the sum due is not paid within a time limited by the decree of the court, sufficient of the property may be sold to pay the same. But if the property cannot be sold in parcels, without injury to the parties or one of them, the court may order the whole of it sold, free from the lien of the mortgage, and apply the proceeds on the whole debt, according to its then value. (*Brinkerhoff v. Thalhimer*, 2 John. Ch. 486; *Meyer v. Graeber*, 19 Kans. 165; *Morgenstern v. Klees*, 30 Ill. 422; *Chicago, etc., v. Fosdick*, 106 U. S. 67; *Credit Co. v. Arkansas, etc., Co.* 15 Fed. Rep. 52; Jones on Mort. secs. 1181, 1459, 1478.)

This rule of law is recognized by the Oregon code of C. P. concerning the enforcement or foreclosure of the lien of a mortgage. Section 417 provides: "When a suit is commenced to foreclose a lien, by which a debt is secured, which debt is payable in installments either of interest or principal, and any of such installments is not then due, the court shall decree a foreclosure of the lien, and may also decree a sale of the property for the satisfaction of the whole of such debt, or so much thereof as may be necessary to satisfy the installment then due, with costs of suit; and in the latter case the decree of foreclosure as to the remainder of the property may be enforced by an order of sale, in whole or in part, whenever default shall be made in the payment of the installments not then due."

And a court of equity, without any such statutory provision, will retain jurisdiction of the case and work out the same result. In fact, this and similar statutory provisions

Points decided.

[August,

in other states is merely an affirmation or crystallization of a prior equity practice or procedure.

This mortgage was made to secure the payment of the interest coupons, as well as the bonds to which they are attached. Each of such coupons is an installment of the debt secured by the mortgage, and judgment might be obtained thereon for the amount in an action at law; and the right to maintain a suit in equity to enforce the lien of the mortgage, as to such coupon, as soon as it becomes due, is equally clear.

Of course, in this suit the allegation in the bill that the defendant has failed to keep the property in "good order and repair," is altogether immaterial. The remedy for such default is not a sale of the property, but to take or obtain possession of it and put it in repair. Besides, if the matter was material such a general and indefinite allegation of failure to keep the covenant concerning repairs, would avail nothing.

The demurrer to the first cause of suit stated in the bill and to so much thereof as relates to it, is overruled, and to the second one it is sustained.

SHARON v. HILL.

[In the matter of the report of the examiner in chancery in relation to proceedings on the examination of witnesses, August 3, 1885.]

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 5, 1885.

1. THE JURISDICTION OF THE UNITED STATES COURTS of offenses committed in places in California purchased by the United States, by the consent of the legislature of the state, for a custom house, and other needful buildings, and used for such buildings, is exclusive.
2. DEADLY WEAPONS—CONTEMPT AND OFFENSES.—The drawing of a pistol, and threatening the lives of counsel, in the presence of an examiner in chancery while taking testimony in an equity case, pending in the United States circuit court, in the chambers of the judge adjoining the courtroom, situate upon land thus under the exclusive jurisdiction of the

1885]

Examiner's Report.

United States, is both a contempt of court, punishable as such, and an offense under the statutes of the United States, punishable on indictment.

3. CONTEMPT OF COURT—OFFENSES UNDER THE STATUTE.—Where the same acts constitute offenses against the United States, punishable upon information or indictment, and at the same time a contempt of court, punishable as such, and there is no special end, in the administration of justice, to be accomplished by proceeding, summarily, on process for contempt, the court may waive the process for contempt, and leave the government to proceed to punish the offense under the statute.
4. ARMED ATTORNEYS.—The going into court, by members of the bar, armed with deadly weapons, characterized as not only a contempt of court, but also *professional misconduct*, that ought to be punished by suspension from practice or disbarment.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

On August 4, 1885, the examiner in chancery appointed in this case to take the testimony of witnesses, made the following report to the court:

In the circuit court of the United States, for the ninth circuit and district of California:

WILLIAM SHARON }
v. } No. 3138.
S. A. HILL. }

To the honorable, the circuit court of the United States, for the ninth circuit and district of California:

I, the undersigned, examiner in chancery of said court, conforming to request of counsel for complainant in the above entitled cause, do certify:

At a regular session of the examination in the above entitled cause, on the 3d day of August, 1885, at my office in the appraisers' building, San Francisco, California, being the time and place to which said examination was regularly adjourned, there were present William M. Stewart, Esq., and Oliver P. Evans, Esq., of counsel for complainant; W. B. Tyler, Esq., of counsel for respondent; the respondent *in propria persona*, and R. U. Piper, recalled as a witness on behalf of complainant in rebuttal.

During the examination of said Piper, the respondent, who was sitting at the table engaged in reading a deposition of

Examiner's Report.

[August,

Susan Elizabeth Smith, made herein, became apparently much excited. Following is a transcript setting forth a portion of the proceedings taken from the notes of the reporter:

The RESPONDENT—I won't sign my deposition unless it contains everything that I said about Stewart's family. He don't dare to take me up on it. I won't sign that evidence unless that is put in.

The EXAMINER—Don't talk about it now.

The RESPONDENT—It has got to go in.

The EXAMINER—This is no proper time for bringing up any matter of that kind. A witness is under examination.

The RESPONDENT—When I see this testimony I feel like taking that man Stewart out and cowhiding him. I will shoot him yet; that very man sitting there. To think he would put up a woman to come here and deliberately lie about me like that. I will shoot him. They know when I say I will do it that I will do it. I shall shoot him as sure as you live; that man that is sitting right there; and I shall have that woman, Mrs. Smith, arrested for this, and make her prove it.

The EXAMINER—Those are not matters which should be brought up now. Don't talk in this way when a witness is under examination.

The RESPONDENT—I say no jury will convict me for shooting a man that will bring a woman here to tell such things on me. They have never dared, when they put me on the stand, to ask me a question against my character yet; never dared, if they have got so much against it, why didn't they dare ask me some questions when I was on the stand?

The EXAMINER—Mr. Tyler, can you put a stop to this interruption?

The RESPONDENT—Mrs. Smith said nothing here about my being in a weak condition in Dr. Murphy's office,—that has been put in the testimony,—and that I wanted her to play nurse to me. She was a nurse to me, and I paid her for it.

1885.]

Examiner's Report.

The EXAMINER—Mr. Tyler, can you put a stop to this? I find that I cannot, and unless you can, I shall have to adjourn the examination and bring this matter to the attention of the court. This thing has gone altogether too far already, and unless it can be stopped here, I certainly shall adjourn the examination.

Mr. TYLER—Let us get through this afternoon, anyway.

The RESPONDENT—I know the woman he is living with, and he brought his wife out here to cover it up. I will expose the whole thing, about the child and all.

The EXAMINER—Will you remain quiet until this examination is completed?

The RESPONDENT—I don't know whether I will remain quiet without I get that man's life. I get so worked up when I read this testimony of Mrs. Smith.

The EXAMINER—Let me take that testimony until after the examination is over.

The RESPONDENT—I expect you had better.

The EXAMINER—You may finish reading Mrs. Smith's testimony after the close of the session. I hope, now, I shall not be compelled to bring your misbehavior to the attention of the court, for if I should do so, the court will surely punish you for contempt.

The RESPONDENT—That would be nothing unusual if Stewart asked it.

The EXAMINER—I shall ask it in this instance, because my duty compels me to do so. You persist in interrupting the proceedings, and it is impossible for the examination to go on. If you will wait until we get through with this examination, if you have anything to say, then it will be a more appropriate time to say it.

The RESPONDENT—I can hit a four-bit piece nine times out of ten.

The EXAMINER—If you interrupt the proceedings any further, I shall adjourn the examination and call the attention of the court to this matter, and it won't be my fault if the court does not take such measures as will put a stop to such interruptions. I have at all times been disposed to be as

Examiner's Report.

[August,

tolerant and lenient with you as possible, but toleration should have a limit, and the limit has been reached. Early in the proceedings the court suggested that I ought to be very lenient with you, and, in conformity to that suggestion, as well as my own inclination, I have treated you with the greatest consideration and forbearance all through.

The RESPONDENT—That is enough; you needn't say anything more.

The EXAMINER—But I propose to say something more.

The RESPONDENT—All right; then I'll talk:

The EXAMINER—Since the commencement of the examination in this case, your offensive conduct has frequently disturbed the orderly course of the proceedings, and I have tried in every way which my imagination could suggest to check you—by considerate treatment, by ignoring your misbehavior, by courteous protest and persuasion, by rebuke, by appeals to your counsel, by threatening to report your conduct to the court. But, instead of abating, the evil is constantly growing worse. Now this thing must stop.

The respondent ceased speaking at this point, and the examination proceeded.

In addition to the above quoted remarks of respondent, she made further statements defamatory of the character of people not connected with the case, which remarks are deemed not necessary to be repeated in this report.

The examination of the witness Piper having been concluded, Victor Craig was recalled as a witness on behalf of the complainant in rebuttal. Pending his examination, the respondent drew a pistol from her satchel and held it in her right hand, the hand resting for a moment upon the table, with the weapon pointed in the direction of Judge Evans, the hand and weapon being then dropped to her lap, beneath the table. At this time Mr. Stewart had left the room. Judge Evans, noticing the action of the respondent, said:

What do you want? Do you want to shoot anybody?

The RESPONDENT—I am not going to shoot you just now, unless you would like to be shot, and think you deserve it.

Mr. EVANS—No; I would rather not be.

1885.]

Opinion of the Court—Mr. Justice Field.

The EXAMINER—Unless you will give that pistol into my custody I shall adjourn the examination and report this matter to the Court.

The RESPONDENT—I am not going to shoot anybody. I will give it into your custody.

The EXAMINER—I will adjourn this examination until tomorrow. Won't you give me that pistol?

The respondent complied with the request, and allowed the examiner to take her pistol.

Mr. EVANS—We don't desire to proceed any further, under the circumstances. We ask that this matter be reported to the court.

The RESPONDENT—You shall not slander me. These men know they need it, and I told the supreme court they knew they needed it.

Mr. EVANS—I shall decline to proceed any further.

The examination was adjourned by the examiner to August 4, 1885, at ten o'clock A. M.

It may be proper to add that upon previous occasions respondent has brought to the examiner's room, during the examination, a pistol, and has sat for some length of time holding it in her hand, to the knowledge of all persons present at the time.

Respectfully submitted.

S. C. HOUGHTON, Examiner, etc.

On August 5, the report was considered by the court, Mr. Justice Field, and Sawyer, Circuit Judge, being present.

Mr. William M. Stewart and Mr. Oliver P. Evans, for complainant.

Mr. W. B. Tyler, for defendant.

FIELD, Circuit Justice. In the case of *William Sharon v. Sarah Althea Hill*, the examiner in chancery, appointed to take the testimony, has reported to the court that very disorderly proceedings took place before him on the 3d instant; that at that day, in his room, when counsel of the parties, and the defendant were present, and during the

Opinion of the Court—Mr. Justice Field.

[August,

examination of a witness by the name of Piper, the defendant became very much excited, and threatened to take the life of one of the counsel; and that, subsequently, she drew a pistol, and declared her intention to carry her threat into effect. It appears, also, from the report of the examiner, that, on repeated occasions, the defendant has attended before him, during the examination of witnesses, armed with a pistol. Such conduct, is an offense against the laws of the United States, punishable by fine and imprisonment. It interferes with the due order of proceedings in the administration of justice, and it is well calculated to bring them into contempt. I, myself, have not, heretofore, sat in this case, and do not expect to participate in its decision; I intend in a few days to leave for the east, but I have been consulted by my associate, and have been requested to take part in this side proceeding, for it is of the utmost importance for the due administration of justice, that such misbehavior as the examiner reports should be stopped, and measures be taken which will prevent its recurrence. My associate will comment upon the laws of congress, which make the act committed by the defendant, a misdemeanor, punishable by fine and imprisonment.

The marshal will be directed to disarm the defendant, whenever she comes before the examiner, or into court in any future proceedings, and to appoint an officer to keep strict surveillance over her, in order that she may not carry out her threatened purpose.

This order will be entered:

Whereas, it appears from the report to this court of the examiner in chancery, in this case, appointed to take the testimony of witnesses, that on the third day of August instant, at his office, counsel of the parties appeared, namely, William M. Stewart, Esquire, and Oliver P. Evans, Esquire, for the complaint, and W. B. Tyler, Esquire, for the defendant, and the defendant in person, and that during the examination before said examiner of a witness named Piper, the defendant became excited and threatened the life of one of the counsel of the complainant present, and

1885.]

Opinion of the Court—Sawyer, C. J.

exhibited a pistol with a declared purpose to carry such threat into effect, thereby obstructing the order of the proceedings and endeavoring to bring the same into contempt:

And whereas, it further appears, that said defendant habitually attends before the said examiner carrying a pistol, it is ordered, that the marshal of this court take all such measures, as may be necessary, to disarm said defendant, and keep her disarmed, and under strict surveillance whilst she is attending the examination of witnesses before said examiner, and whenever attending in court, and that a deputy be detailed for that purpose.

Mr. Clerk, enter the order.

Mr. Justice Sawyer will explain for the benefit of counsel the statutes of congress. It is to be observed here that the block, embracing this building and the custom house, is under the exclusive jurisdiction of the United States. Every offense committed within it, is an offense against the United States, and, here, the state has no jurisdiction whatever. This fact seems to have been forgotten by the parties.

SAWYER, Circuit Judge. The occasion, I think, calls for some observations on my part, in regard to this matter.

The taking of testimony in this case has been going on for a long time. During the progress of the case, many things had occurred, that were exceedingly unpleasant, but through the considerate and commendable forbearance of the examiner, and of counsel, a point had been reached where the testimony was nearly completed, and, it was hoped, would soon be closed without further interruption, when the incident occurred, which imperatively required this report from the examiner. The occurrence is one of great gravity. The lives of officers of the court, in attendance before a branch of the court, in the performance of their duties as counsel, being in danger, the examiner justly felt, that he could no longer refrain from reporting the action of the defendant without a neglect of official duty.

In connection with this matter, I shall call attention to some facts, and some points of law, that may not be within the knowledge of the party implicated, and may even have

escaped the notice of counsel, in order that such offenses against the laws of the United States, may not in future be, ignorantly, committed. Of course, we are all familiar with the maxim, that everybody is supposed to know the law, yet, in point of fact, it often occurs, that many do not. I shall, therefore, proceed to state some provisions of the statutes in relation to transactions of the kind reported, that may not have attracted notice, in order to guard against any such future misconduct, as will lead to serious difficulties, and necessitate severe punishment.

As was remarked by the presiding justice, this building is under the exclusive jurisdiction of the United States. The block on which it stands, has been purchased by the United States, from the state of California, by the consent of the legislature, for the erection of the public buildings upon it; and it is by the constitution thus placed under the exclusive jurisdiction of the United States. All offenses committed in this edifice, or upon the block of land upon which it stands, are offenses against the United States, punishable exclusively by the national courts. This point was authoritatively decided at the last term of the supreme court of the United States, in the case of *The Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S., 525.

Every offense recognized by law, from the highest down to a simple assault, committed in this building, or on this block, is an offense against the United States, and punishable as such by the courts of the United States. The United States statutes have not defined, specifically, in terms, every offense, but they have defined a number of the graver class, and then made a general provision covering all others.

Section 5,391 of the revised statute, provides, as follows: "If any offense be committed in any place, which has been, or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not, specially, provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the state in

1885.]

Opinion of the Court—Sawyer, C. J.

which such place is situated, now in force, provide for the like offense, when committed within the jurisdiction of such state.”

Thus, an act not, specifically, made an offense, by the statutes of the United States, but which is an offense under the laws of the state, wherein performed, is made, by this general provision, also, an offense under the laws of the United States, and punishable by the same penalties, which are inflicted under the laws of the state.

Under the provisions referred to, the acts, as reported by the examiner in this case, constitute, at least, two if not three, offenses against the United States—perhaps four.

Section 5,399 (omitting that portion relating to other matters) provides as follows: “Every person who by threats endeavors to influence, intimidate or impede any officer in any court of the United States, in the discharge of his duty, or by threats of force obstructs or impedes or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both.”

In this matter as reported by the examiner, there was an obstruction of an officer—the examiner in chancery of this court, and of counselors of the court, who are officers of the court, in the discharge of their respective duties, and, also, an impeding of the due administration of justice. The obstruction resulted in an adjournment of the examination, as neither counsel nor examiner were willing to proceed in face of the menace offered to counsel accompanied by the exhibition of a pistol by the defendant in the suit.

Again, the penal code of this state makes the following provision, and the general statute, which I have read, making all offenses in the state, which are not, specifically, defined in the statute of the United States, offenses against the United States, and punishable by the same penalty, as in the state, makes this an offense against the United States.

Section 417 of the penal code of California provides, that: “Every person who, not in necessary self-defense, in the

Opinion of the Court—Sawyer, C. J.

[August,

presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry and threatening manner, or who, in any manner, unlawfully uses the same, in any fight or quarrel, is guilty of a misdemeanor."

Another section provides that the punishment for misdemeanors, not otherwise, specially, provided for, shall be by imprisonment in the county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or both:" Penal Code, sec. 19.

Again, section 467 of the Penal Code of California provides as follows: "Every person having upon him any deadly weapon, with intent to assault another, is guilty of a misdemeanor."

And there are various other cognate offenses, all of which, are offenses against the United States, by adoption, in the section which I have already read.

As before remarked, every offense which is committed in this building, or on this block, from the highest down to an assault, is an offense against the United States, exclusively punishable by the courts of the United States, and attention is called to this fact, so that parties may not, in future, unwittingly commit any of these offenses, and subject themselves to the penalties prescribed by the law.

This report of the examiner having been made, it imperatively calls for some action by the court. It cannot be passed unnoticed. It is proper to observe, that counsel for the opposing party have exhibited great moderation, and have only sought the protection of their lives; they have not asked the court to proceed to punish defendant for the contempt committed. They only ask, and it is, certainly, a very moderate, and reasonable request, that they shall not be required to practice their profession in a circuit court of the United States, at the muzzle of their opponent's pistol. The court, of its own motion, the matter having been brought to its attention, might well proceed upon the case as reported, as a gross contempt of court. It is, unquestionably, a contempt. It is a contempt committed before an officer, lawfully taking testimony in this case, the pro-

1885.]

Opinion of the Court—Sawyer, C. J.

ceeding being a part of the trial of the case, in the chambers of the judge, adjoining the court room, the examiner being an adjunct of the court—a part of the court itself. This act reported, is undoubtedly, as, distinctly, and, clearly, a contempt of court, as though committed in the presence of the judge, in the court room, while in the act of trying a case, either with or without a jury. This point is well discussed by Judge Hammond, of the district of Tennessee, in *U. S. v. Anonymous*, a case of much milder type of contempt, 21 Fed. Rep., 761.

But these same acts, which constitute a contempt in this case, also constitute several offenses under the laws of the United States, punishable in the ordinary course of criminal proceedings.

There are but two objects of proceeding by process for contempt. One is, to punish a contempt already committed, as a past offense, where, perhaps, the criminal statutes do not cover the case, or, in some cases, where they do, but where the exigencies of the occasion require a more summary, and prompt remedy; and the other object is to enforce the performance of some duty, or act, which, is, still in the power of the party to perform.

So far as future action is concerned, we have endeavored to provide for the safety of counsel, by the order which we have just made, requiring the marshal to see that the defendant does not enter the room of the examiner, or the chambers of the judge, or the court room, while armed; and, also, by calling attention to the liability to criminal punishment for other similar acts that may be performed in the future.

As to the past offense, we might well proceed to punish the acts reported, as a gross contempt of court. But, where the same acts constitute both a contempt of court, which could be punished as such—that is to say, as a past contempt—and at the same time constitute an offense against the laws of the country, which may be punished on indictment, or information,—though sometimes it is necessary to promptly vindicate the court by means of the more summary

Note to decision—Sawyer, C. J.

[August,

process for contempt,—as a general rule, it is desirable to proceed criminally, if in the ordinary exercise of the criminal jurisdiction of the court, it can just as well be done. In such cases, where there is no special end, in the administration of justice, to be attained by a proceeding for contempt, it is deemed better, to adopt the more deliberate, mode of procedure applicable to the enforcement of the criminal laws of the country. We have not been asked to proceed by process of contempt, and as there appears to be no special call for hasty action, we deem it advisable, under the circumstances of this case, to proceed in the more deliberate, careful, and less harsh proceeding, under the charge of the government, than to proceed by process for contempt. We shall, therefore, waive the process for contempt; and the attention of the United States attorney having now, here, been called to the breach of the laws, as reported by the examiner, we shall leave the matter to such course of proceeding as he may deem it his duty to take, to enforce the criminal laws of the country.

Immediately after the announcement of the decision, the following colloquy occurred, illustrating the views of the court, as to the character of the professional conduct of members of the bar who enter the court room armed. It is deemed of sufficient importance to the public, and the bar, to justify appending it, as a note, to the decision.

Mr. W. B. TYLER—If the court please, of course I deprecate any such acts as those reported, either in the court room, or in the examiner's office, as much as anybody; but I would suggest that there be an addition made to that order of the court, and that is, that nobody be allowed to enter that room armed, during the progress of this examination. I think it is necessary, I think it is proper, and there is no more reason—

Justice FIELD—We have no evidence that anybody else has gone into the examiner's room armed. We have only made an order to apply to what is brought to our knowledge.

Mr. TYLER—As his honor, Judge Sawyer, remarked, sev-

1885.]

Note to decision—Sawyer, C. J.

eral very unpleasant things have occurred in there that perhaps your honor has no more evidence of—

Justice FIELD—I know nothing of them, of course.

Judge SAWYER—We considered that matter, to which you refer, Mr. Tyler, and we had no evidence of anything of that kind. No attorney or counsel should be guilty of any such breach of propriety. And after calling attention to the statutes of the United States, and to the fact that carrying arms for an unlawful purpose, is an offense against the statutes, we hardly expect, that any member of the bar of this court will presume to enter the examiner's room, or the court room, armed. We cannot presume, that members of the bar will be guilty of any such professional misconduct.

Justice FIELD—I may add here, further, that any lawyer who so far forgets his professional duty as to come into a court of justice armed, ought to be disbarred from practice.

Mr. TYLER referred to witnesses as being sometimes armed.

Judge SAWYER—Witnesses, it is true, may come into court armed; but with the admonition we have given, and as there has been no evidence that witnesses have come before the examiner armed, we think it hardly advisable, to anticipate any difficulty in that direction. We apprehend that witnesses will be likely, hereafter, to conduct themselves with propriety.

Mr. TYLER—I would say to his honor, Judge Field, that although I thoroughly concede everything he says in certain instances, yet, where a lawyer has information that a witness will come armed, he will very likely do as I myself have done—come armed, to protect himself.

Justice FIELD—Then he would act very improperly. He should report the fact to the court and have the man carrying arms arrested.

Judge SAWYER—When you have any such information, you should have the party put under bonds, or apply to the court in advance for protection.

Justice FIELD—Any man, counsel or witness, who comes into a court of justice armed ought to be punished, and if he is a member of the bar, he ought to be suspended or

Note to decision—Sawyer, C. J.

[August,

removed permanently. That is the doctrine that ought to be inculcated from the bench everywhere. So far as I have the power, I will enforce it.

Mr. TYLER—So should I enforce it.

Justice FIELD—The reason that you give for carrying arms in the court room is not a good reason.

Mr. TYLER—Where witnesses do come armed—

Justice FIELD—Then report the fact to the court; that is the proper way.

Mr. TYLER—That will not stop a bullet.

Judge SAWYER—Then arrest the parties in advance, and put them under bonds, or apply to the court to have them examined and disarmed before permitting them to enter the court. The laws are very severe.

Mr. TYLER—The laws are very severe, but it is harder on the man that gets the bullet.

Justice FIELD—I don't mean to say that there may not be times in the history of a country, in certain communities, when everybody is armed. That was the case in the early days of California, when people traveled armed; but at this time, when law is supposed to be supreme, when all good men are supposed to obey it, and where counselors are sworn to obey the law and to see it properly administered, the carrying of arms into a court cannot for a moment be tolerated.

Mr. TYLER—Your honor will excuse me one minute, as this is a personal matter, and a little personal reflection on myself, in view of another proceeding which has taken place.

Justice FIELD—I know nothing of any other proceeding—

Mr. TYLER (interrupting)—But as you have expressed your opinion that a lawyer who, under any circumstances, should come into a court of justice armed, should be disbarred, and that was my exact case, I, certainly, have a right to explain that circumstance. During the trial of a case in the superior court—

Justice FIELD—We do not care about hearing of that. We cannot go into that matter at all.

1885.]

Points decided.

Mr. TYLER—Don't you consider, that to make that assertion, as an absolute assertion, when it applies directly to a member of the bar of this court, and has nothing to do with this matter, that the member may answer? You have made that assertion, and I went into a court room armed with a pistol, for the purpose of preserving, as I supposed, my father's life and my own; and now I make the explanation.

Justice FIELD—It is not worth while to pass any words with the court. We do not take our rules of procedure from the state courts, and if any lawlessness is permitted there, we should not be governed by that fact. I trust I never shall be called to preside over a federal court, where any lawyer will presume to come into the court room armed, and if he does, I shall exercise such authority as is vested in me to prevent a repetition of such conduct. What may have been done in a state court, I know nothing about.

ENDEY v. COMMERCIAL FIRE INS. CO. OF NEW YORK.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 17, 1885.

1. REMOVAL—CITIZENSHIP—A suit cannot be removed from a state to a national court, under the act of 1875, on the ground of citizenship, unless the requisite citizenship of the parties exists, both when the suit was commenced and at the time of filing the petition for removal.
2. AMENDMENT OF PETITION IN UNITED STATES COURTS—Where a petition for removal does not show the requisite citizenship of the parties, whether the circuit court is authorized to allow an amendment showing jurisdiction, *quære*? But, conceding the power, where the state court has refused to order the removal of a cause on a defective petition, an amendment in the United States circuit court, to remedy the defect, is not a matter of right, and the court in the ninth circuit will not permit an amendment. Inconvenience of allowing amendments in such cases pointed out.

Before SAWYER, Circuit Judge.

Mr. Crittenden Thornlon, for motion.*Messrs. Eagan & Armstrong*, contra.

SAWYER, Circuit Judge. A suit cannot be removed from a state court to a national court on the ground of citizenship, under the act of 1875, unless the requisite citizenship of the parties existed both when the suit was commenced, and at the time of filing the petition for removal. (*Gibson v. Bruce*, 108 U. S. 562; *Houston & Tex. Cent. R. Co. v. Shirley*, 111 U. S. 358.) The record in this case does not show the proper citizenship of plaintiff, at the time of the commencement of the suit, and the state court, therefore, properly, refused to make an order removing the cause.

Plaintiff asks leave to amend his petition, in this court, in such manner, as to show the proper citizenship of the parties to give jurisdiction. In *McNaughton v. S. Pa. Coast R. R. Co.*, 10 Sawy. 111, doubt was expressed as to the authority of the court to allow such an amendment, notwithstanding the ruling to the contrary in some circuits, and the inconvenience of the practice was pointed out. But, conceding the authority, it was held that such an amendment is not a matter of right, but a matter resting in the sound discretion of the court, and ought not to be permitted.

This court is still satisfied with that ruling, and will adhere to it until overruled by higher authority. As shown in the case cited, great embarrassments might result from such an amendment, as after an amendment in the United States circuit court the records of both courts would show jurisdiction. The supreme court has settled the point that the state court is not required to let go its hold upon a case till a proper cause for removal is shown by its record. This being so, upon an amendment in the circuit court, both courts might regularly proceed to render final judgments that might be different, or even be opposed, and there be no error disclosed by the record of either court, upon which the judgment could be reversed.

The amendment of the petition is denied, and the cause remanded, with costs.

UNITED STATES v. McLAUGHLIN ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 18, 1885.

1. EXCEPTIONS TO ANSWER IN EQUITY FOR INSUFFICIENCY—Exceptions for insufficiency of answer to particular allegations in bills of equity only lie where a discovery is sought—where the complainant seeks evidence to sustain his bill.
2. SAME—CORPORATIONS—INFANTS, ETC.—Such exceptions do not lie to answers of corporations; to answers wherein the defendant's oath is waived; to answers of the attorney general, or to answers of infants; because such answers are not evidence.
3. THE FOUNDATION FOR AN EXCEPTION FOR INSUFFICIENCY consists of a sufficient allegation in the bill and a sufficient interrogatory based upon it.
4. SAME—Under the old equity practice, the general interrogatory, at the end of the bill, requiring defendant "to answer every allegation as fully and particularly as if specifically interrogated thereto," was held to afford a foundation for an exception for insufficiency. But it was necessary that there should be either a special interrogatory, or this general requirement.
5. UNDER EQUITY RULES 41-43, it is, at least, doubtful, whether an exception, for insufficiency would now lie in the national courts without a special interrogatory.
6. PRACTICE OF EXCEPTING FOR INSUFFICIENCY OBSOLETE AND DANGEROUS TO COMPLAINANT—Where the parties are competent witnesses, the practice of calling for a discovery, and excepting to answers for insufficiency, is useless and becoming obsolete. The great inconvenience and danger to complainant of pressing the defendant to positive denials by exceptions, pointed out.
7. BILLS OF DISCOVERY OBSOLETE—Whether a pure bill of discovery will lie, where the parties are competent witnesses, *quære?*
8. EXCEPTIONS FOR IMPERTINENCE—The court will not order matter excepted to as impertinent to be stricken out, unless its impertinence is very fully and clearly made to appear. Nor will the court strike out matter as impertinent because there are here and there a few unnecessary words.
9. FINAL LOCATION OF RAILROAD LAND GRANT—Suggestion as to when location becomes definitely fixed, under the Union Pacific Railroad grant, so as to perfect the right of the grantee to the land.

Before SAWYER, Circuit Judge.

Mr. S. G. Hilborn, United States attorney, and Mr. Mich. Mullany, for the complainant.

Mr. A. L. Rhodes, for the defendants.

SAWYER, Circuit Judge, delivering an oral decision:

In the numerous exceptions filed by the complainant to the answer in this case, two grounds are specified, insufficiency, and impertinence.

Two classes of insufficiency are recognized in equity practice. The first, is, where the whole answer is alleged to be insufficient to constitute a defense. In such a case, the complainant usually, has the case set down for argument upon the bill and answer, and the question is disposed of in that method. In other cases, exceptions for insufficiency are taken as to some particular portion or portions of the answer, upon the ground that certain allegations of the bill have not been admitted, or fully and specifically denied, or that the denial is evasive. In such cases, the object of the party excepting is to get in the answer a full, specific and clear admission or denial of the allegations. Exceptions for insufficiency, in respect to such matters, are only applicable to matters of discovery, where the complainant is compelled to rely on the defendant for evidence to prove his case. Such an exception will not lie to the answer of a corporation, because the answer of a corporation is not evidence; it is not put in under oath, but under the seal of the corporation. And, for similar reasons, an exception for insufficiency as to the answer to any particular allegation of the bill does not lie where the oath to the answer is waived. The same rule applies to the answer of the attorney general and answers of infants. (2 Dan. Ch. Pr., ed. 1841, 879, and note.)

Exceptions for insufficiency, of the class last referred to, can relate, only, to the subject matter of a bill of discovery, where a party seeks to obtain, in the answer, evidence from his opponent; and they are, specially, adapted to a system of practice, where parties are incompetent witnesses in their own cases.

With relation to such exceptions, Hoffman, in his Master in Chancery, says: "The foundation for an exception for insufficiency consists of a sufficient allegation in the bill, and a *sufficient interrogatory based upon it.*"

And it has been held, under the old practice, that the general interrogatory at the end of the bill, requiring the

1885.]

Opinion of the Court—Sawyer, C. J.

defendant to answer, as to all matters alleged in the bill, as, fully, and, particularly, as though specifically interrogated thereupon, is a sufficient interrogatory upon which to base an exception. But there must always have been, as a foundation for such an exception, either that general demand in the answer, or a specific interrogatory directed to the particular allegation of the bill, specified in the exception.

In the case of *Methodist Episcopal Church v. Jacques*, 1 John. Ch. 75, it was held that the general interrogatory in the bill is sufficient to base an exception of this kind upon.

“The mere objection to a further discovery, is, that the bill contains no special interrogatories. The bill contains the *general* interrogatory ‘that the defendants may full answer make to all and singular the premises, fully and particularly, as though the same were repeated, and they specially interrogated, paragraph by paragraph, with sums, dates, and all attending circumstances, and incidental transactions.’ The question, then, is, whether this be not sufficient to call for a full and frank discovery of the whole subject matter of the bill; and I apprehend the rule on this subject to be, that it is sufficient to make this general requisition on the defendant to answer the contents of the bill, and that the interrogating part of the bill, by a repetition of the several matters, is not necessary.”

It has, also, been held, that no exception would lie, except where an interrogatory, either special, or general, like that just quoted, called for an answer to the allegations of the bill. The decision cited was rendered before the adoption of the equity rules of the supreme court. In our present practice, under the provisions of equity rules 41–43, which permit a complainant, if he desires, to file interrogatories, and prescribe the form to be followed, I apprehend, that a general interrogatory would be insufficient. But, however that may be, the bill in this case is in no sense a bill of discovery, excepting so far as all bills, in which an answer under oath has not been waived, may, in a certain sense, be regarded as bills of discovery. It contains no general interrogatory, and no specific interrogatory pointing to the mat-

Opinion of the Court—Sawyer, C. J.

[August,

ter set forth in the exception, and, manifestly, was not intended as a bill of discovery, but as, purely, a bill for relief. Though an answer upon oath is not waived, yet no demand in the nature of those which distinguish a bill of discovery is made anywhere in the bill. It is manifestly intended, simply, as a bill for relief, the complainants not seeking evidence, but intending to rely upon the testimony of witnesses to prove their case.

It is very doubtful whether a pure bill of discovery in an equity suit would lie, at the present day. It may be, that a discovery might be asked for in a bill of relief; but it is probable that no prudent counsel, understanding what must be the effect, would at this day file a pure bill of discovery, or call for a discovery in a bill for relief, and thus, unnecessarily, give the defendant an advantage which he would not otherwise have, under our present practice, which enables a complainant to place the defendant upon the stand and examine him as a witness, and thereby obtain his testimony much more judiciously—testimony of a character less prejudicial to his client's interests than it would be were the testimony to come in the form of a sworn answer, strained through the legal cullender of his counsel, and by him shaped and shaded in his office at his leisure. Very wisely, I think, the bill, in the present case, has been made a bill for relief, not a bill of discovery. See *Slessinger v. Buckingham*, 8 Sawy. 469.

In *Ex parte Boyd*, 105 U. S. 657, the supreme court intimates that, at this day, bills of discovery are not only useless, but obsolete, and very strongly indicate a confirmation of the idea which this court has endeavored to impress upon the bar here; that is to say, that the spending of time upon exceptions to answers is useless, and such exceptions are, usually, very much to the disadvantage of the party resorting to them. A defendant is often pressed to a direct denial, which constitutes proof of his case, in his own favor, which must be overthrown by the testimony of two witnesses, or equivalent proof on the part of the complainant. As I have intimated, this bill contains no allegation

1885.]

Opinion of the Court—Sawyer, C. J.

looking to a discovery. It merely undertakes to allege the grounds of suit, and to develop the issues, and, manifestly, was not intended to obtain evidence to prove the issues.

The first exception is, in general language, that an allegation of complainant's bill of complaint, indicated, "is not sufficiently, or at all, answered, denied, or admitted, in or by said answer."

There is in the bill no demand for an answer, general or specific, upon which that exception can rest. The bill is not framed for the purpose of procuring evidence, but is, evidently, for relief merely. I shall therefore overrule that exception, and leave the complainant to make his proof in relation to the facts referred to, by calling the parties as witnesses, if he so desires, or by other documentary evidence, and to obtain evidence by proceeding in the ordinary course. One of the defendants is a corporation, to an answer of which, exceptions for insufficiency, as we have seen, do not lie.

The other exceptions, although some of them refer to matters in the answer which are alleged to be impertinent, or refer to particulars in which the answer is alleged to be ambiguous, or insufficient, are all, really, exceptions for insufficiency. There is no such term as "ambiguous" known in equity practice, with relation to a pleading, except in so far as it may be embraced in the term "insufficient." An answer may be insufficient because it is ambiguous.

Another averment contained in these exceptions is, that the answer is, with reference to certain portions of the bill, impertinent. In the fourth exception a certain portion of the answer is alleged to be impertinent, indefinite, and ambiguous. The only point to that exception must be, that the allegations referred to are impertinent. The rule as to impertinence is well stated by Justice Story, in Story's Equity Pleadings, section 267, as follows:

"However, in cases of mere impertinence, the court will not, because there are here and there a few unnecessary words, treat them as impertinent; for the rule is designed to prevent oppression, and is not to be so construed as to

Opinion of the Court—Sawyer, C. J.

[August.]

become itself oppressive. Nor will the court, in cases of alleged impertinence, order the matter alleged to be impertinent to be struck out, unless in cases where the impertinence is very fully and clearly made out; for if it is erroneously struck out, the error is irremediable; but if it is not struck out, the court may set the matter right in point of costs."

In a note, attention is called to the language of Mr. Vice Chancellor Bruce, in the case of *Davis v. Cripps*, 2 Younge & Coll., New Reports 443:

"The court, in cases of impertinence, ought, before expunging the matter alleged to be impertinent, to be especially clear that it is such as ought to be struck out of the record, for this reason, that the error on one side is irremediable, on the other not. If the court strikes it out of the record, it is gone, and the party may then have no opportunity of placing it there again; whereas, if it is left on the record, and is prolix or oppressive, the court at the hearing of the cause has power to set the matter right in point of costs. That consideration has been alluded to by Lord Eldon, in *Parker v. Fairlie*, and other cases. It ought to be clear to demonstration that the matter complained of is impertinent, before that which, if wrong, is irremediable, is done." See, also, *Attorney General v. Rickards*, 6 Bev. 44; and *Tucker v. Cheshire R. Co.*, 1 Foster 38.

In my judgment, none of the matter pointed out by the exceptions filed in this case is so clearly impertinent as to justify the court in striking it out. To go into the question of striking it out, might require me to pass upon the merits of the case; whereas, unless those portions of the answer referred to in the exceptions are clearly impertinent, they ought not to be stricken out until the final hearing, when the whole case is before the court, and they can be dealt with as justice and the rights of the parties may demand. Whatever may be the decision in this suit, the case will undoubtedly go to the supreme court of the United States on appeal; and if I should be of opinion that these portions of the answer are impertinent, and strike them out, the supreme

1885.]

Opinion of the Court—Sawyer, C. J.

court might be of different opinion; and yet, if stricken out, the supreme court would have no basis upon which to finally determine the question and render the proper decree; and it might be necessary to affirm an erroneous decision, because a part of the defendant's case is not in the record.

The portions of the answer which, it is most earnestly insisted, are impertinent, relate to the different steps taken in definitely fixing the line of location of the railroad. I think the setting out of those steps in the answer is eminently proper. It is assumed that the supreme court, by its decision in the *Dunnemeyer* case, has established the law in this regard. Undoubtedly it has settled the law, so far as this court is concerned. But counsel have a right to ask the supreme court to modify or amend its decision in that case, or to consider its application to a new state of facts. They have a right to submit the question again to that tribunal; and if these portions of the answer be stricken out, there will be no basis upon which to bring these questions again before the court. Besides, in the case referred to, only the case there presented was decided, and the decision is authoritative only to the extent called for in that case. In that decision it is held that the line of the road becomes fixed when it is definitely fixed by the company, and a map of the location filed in the office of the secretary of the interior. The time of the filing of such map was sufficient for the purposes of that case. There might be found to be a difference in this case. That is to say, the filing of the map might be the evidence, and the only evidence, that the secretary of the interior would act upon in issuing a patent. He would require evidence as to the time when the line of the road was definitely fixed, in order to justify him in exercising his functions of issuing a patent. That was the question before the court in the *Dunnemeyer* case, and it is a very different question from the question whether or not some other person has the prior right. The statute in no provision requires that a map of a definite location shall be filed. It is only a map of the general location that the statute requires to be filed in the office of the secretary of the interior; and upon the filing of that map

Opinion of the Court—Sawyer, C. J.

[August,

all lands lying within fifteen miles on each side of the road are reserved from sale, which is a distance of ten miles wider than the extent of the lands granted, giving an opportunity for the line of the road to swing, at least, five miles from the line, as shown in the map of general location, and still have ten miles within which to fix the limits of the grant.

On filing the map of *general* location, under the statute, the lands are withdrawn from pre-emption, or from opportunities on the part of any one else, to acquire rights in them, and that condition of things remains until the road is definitely located and built. When it becomes definitely located, in fact—and it is certainly, really, definitely located when the road is constructed and finished—the railroad company has performed all its duties, and its right to the land has become perfected, I should suppose—at least, counsel may well so argue—and they are entitled to have the question determined by the supreme court, as well as by this court. Even if the secretary of the interior can properly refuse to act upon any other evidence than the filing of the map, *definitely* fixing the location, yet, this is but a rule adopted for *administering the affairs of his office*, and the railroad company's title might still well be fixed and indefeasible before the filing of a map of the definite location; and that map might only furnish final and conclusive evidence upon which the patent should be issued. The right to the land may be perfect before the patent issues, or would be issued, the patent being but the final record and indisputable evidence of the title. The allegations of the answer, then, as to the time when the location was made, as well as when the plats of the different portions of the location were filed, can by no means, in my judgment, be stricken out as impertinent. I think those are matters which should be left in the answer, and open to proof, for consideration by this court, and by the supreme court, on appeal. Even if I should deem such matter impertinent, the supreme court might take a different view, and the parties here have the right to have that question passed upon, on appeal.

These observations especially refer to the exception which was most elaborately argued and most strongly insisted

1885.]

Points decided.

upon; and the other exceptions are of similar character. It may be that some few words, which are excepted to, are impertinent, but they are not so clearly so, or of such importance, as to justify me in sustaining the exceptions.

The exceptions are therefore overruled, with leave granted to complainant to file a replication within five days.

LIEBMAN v. CITY AND COUNTY OF SAN FRANCISCO.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 24, 1885.

1. FEDERAL COURTS FOLLOW STATE COURTS IN CONSTRUING STATE STATUTES unless such construction conflicts with or impairs the efficiency of some principle of the federal constitution or of a federal statute, or a rule of commercial or general law.
2. THE CONSTRUCTION OF THE "MONTGOMERY AVENUE ACT" of April 1, 1872, of the California legislature, by the state supreme court in *Mulligan v. Smith*, 59 Cal., 206, approved and followed.
3. THE PETITION OF PROPERTY OWNERS FOR OPENING MONTGOMERY AVENUE in San Francisco, provided for in the California statute of April 1, 1872, was essential to the validity of the proceedings, including the issue of the bonds authorized by the act, and the sufficiency of the petition must be affirmatively shown to maintain an action on the bonds, unless it can be conclusively presumed from the character of the bonds or their recitals.
4. RECITALS IN MUNICIPAL BONDS OF COMPLIANCE WITH THE STATUTE authorizing their issue, estop the obligors from denying such compliance, as against *bona fide* purchasers of the bonds, for value, and without notice of any defect in the proceedings.
5. RECITALS IN MUNICIPAL BONDS MUST CLEARLY IMPORT COMPLIANCE with the statute authorizing them, in order to estop the obligors from showing that they were issued without authority of law.
6. THE MONTGOMERY AVENUE BONDS CONTAIN NO SUFFICIENT RECITALS of compliance with the statute under which they were issued, the clause relied upon as a recital being a mere caption, and, at most, importing only that: "In conformity with the act, the treasurer will pay;" that is, that he will pay out of the special fund provided for by the act.
7. A CITY IS NOT ESTOPPED BY RECITALS IN BONDS NOT ISSUED BY IT, nor under its authority, but by, and under the name and seal of, a distinct corporation composed of officers of the city, but acting independently of it, created by a special statute providing for the opening of a street in such city and deriving its powers wholly from the statute. Hence, the city and county of San Francisco is not bound by the recitals, if any, con-

Opinion of the Court—Mr. Justice Field.

[August,

tained in the "Montgomery avenue bonds" issued by the board of public works, under the authority of the act of April 1, 1872.

8. THE PARTY ACTUALLY LIABLE ON A BOND MUST HAVE HIS DAY in court, in person, or by his representative, before there can be any binding judgment determining its validity as against him or his property.
9. A CITY CANNOT BE SUED ON BONDS NOT ISSUED BY IT, and upon which the statute authorizing their issue declares that it shall not be liable, merely for the purpose of establishing their validity, so as to obtain a mandamus to compel the levy of the tax provided by the statute for their payment; as where a special statute providing for the opening of a street in a city created a board, to be composed of certain city officers and known as the board of public works, and authorized the board to issue bonds to pay for the lands taken, the bonds to be paid out of a special tax upon the property benefited by the street, and declared that the city should not be liable on the bonds "in any event whatever," and that the holders should take the bonds on that condition, and the bonds were issued accordingly.
10. THE MONTGOMERY AVENUE BONDS ARE NOT BONDS OF THE CITY AND COUNTY OF SAN FRANCISCO, and the municipality, in its corporate capacity, does not stand in any such relation to these obligations, as renders it liable to be sued upon them for any purpose.
11. OPENING MONTGOMERY AVENUE NOT A CORPORATE ACT.—The opening of Montgomery avenue, and dedicating it to public use, under the statute, in question, is not a corporate act, but, an act directed by the state, through its own instrumentalities.
12. THE BOARD OF PUBLIC WORKS, created by the act, is a board created by the state, to perform a specific service, under the statute, but is not a branch of the municipal government.
13. WHO NOT CITY OFFICERS.—Parties performing duties, by authority of a special statute, without the authority of a municipal corporation, and not acting by virtue of any powers conferred on the corporation by its charter, or otherwise, do not act as officers, or agents, of the corporation; and the corporation, not being the principal, their acts, so performed, are not the acts of the corporation.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

Mr. D. M. Delmas, Mr. A. L. Rhodes, and Mr. J. P. Hoge,
for the plaintiff.

Messrs. Garber, Thornton & Bishop, for the defendant.

By the Court, FIELD, Circuit Justice. This is an action against the city and county of San Francisco to compel the payment of twenty coupons for interest, each amounting to thirty dollars, attached to certain instruments designated in the pleadings as "Montgomery avenue bonds." The plaintiff prays for judgment that the coupons are valid obligations of

1885.]

Opinion of the Court—Mr. Justice Field.

the city and county; that there is due by it upon each of them the sum of thirty dollars, with interest from the date of its maturity at the rate of seven per cent. per annum; that the city and county pay the amount thus adjudged due from the special tax to be annually levied, assessed and collected for that purpose, pursuant to the act of the legislature of April 1, 1872; and that the plaintiff recover against it for the costs of this action.

The validity of the bonds, to which the coupons are attached, and, of course, the validity of the coupons also, depends upon that act, and the compliance in their issue with its requirements. The object of the act was to open and establish a public street in the city and county of San Francisco, to be called Montgomery avenue, and to take private lands therefor. It described a strip of land by metes and bounds, and declared that it was taken and dedicated for such street, and that when paid for, the title thereto should vest in the city and county for that purpose, as the title of other public streets was vested. It provided that the value of the property taken, the damages to improvements thereon, or adjacent thereto, and all other expenses incidental to the proceeding, should be considered the cost of the opening of the avenue, and should be assessed upon lands within a described district in proportion to the benefits accruing therefrom, to be ascertained by a board of public works created for that purpose. That board was to consist of the mayor, the tax collector and the surveyor of the city and county of San Francisco; and, whenever the owners of a majority in frontage of the property, which was to bear the burden of the improvement, as they were named in the last preceding annual assessment roll for the state, city and county taxes, should petition the mayor of the city and county, in writing, for the opening of the avenue according to the provisions of the act, the board was to proceed to organize by the election of a president, and then to the performance of its prescribed duties. It was, among other things, to ascertain and report the cash value of the land taken; and the damages caused to the property along the line and within the course of the avenue; also, the benefits

tained in the "Montgomery avenue bonds" issued by the board of public works, under the authority of the act of April 1, 1872.

8. THE PARTY ACTUALLY LIABLE ON A BOND MUST HAVE HIS DAY in court, in person, or by his representative, before there can be any binding judgment determining its validity as against him or his property.
9. A CITY CANNOT BE SUED ON BONDS NOT ISSUED BY IT, and upon which the statute authorizing their issue declares that it shall not be liable, merely for the purpose of establishing their validity, so as to obtain a mandamus to compel the levy of the tax provided by the statute for their payment; as where a special statute providing for the opening of a street in a city created a board, to be composed of certain city officers and known as the board of public works, and authorized the board to issue bonds to pay for the lands taken, the bonds to be paid out of a special tax upon the property benefited by the street, and declared that the city should not be liable on the bonds "in any event whatever," and that the holders should take the bonds on that condition, and the bonds were issued accordingly.
10. THE MONTGOMERY AVENUE BONDS ARE NOT BONDS OF THE CITY AND COUNTY OF SAN FRANCISCO, and the municipality, in its corporate capacity, does not stand in any such relation to these obligations, as renders it liable to be sued upon them for any purpose.
11. OPENING MONTGOMERY AVENUE NOT A CORPORATE ACT.—The opening of Montgomery avenue, and dedicating it to public use, under the statute, in question, is not a corporate act, but, an act directed by the state, through its own instrumentalities.
12. THE BOARD OF PUBLIC WORKS, created by the act, is a board created by the state, to perform a specific service, under the statute, but is not a branch of the municipal government.
13. WHO NOT CITY OFFICERS.—Parties performing duties, by authority of a special statute, without the authority of a municipal corporation, and not acting by virtue of any powers conferred on the corporation by its charter, or otherwise, do not act as officers, or agents, of the corporation; and the corporation, not being the principal, their acts, so performed, are not the acts of the corporation.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

Mr. D. M. Delmas, Mr. A. L. Rhodes, and Mr. J. P. Hoge,
for the plaintiff.

Messrs. Garber, Thornton & Bishop, for the defendant.

By the Court, FIELD, Circuit Justice. This is an action against the city and county of San Francisco to compel the payment of twenty coupons for interest, each amounting to thirty dollars, attached to certain instruments designated in the pleadings as "Montgomery avenue bonds." The plaintiff prays for judgment that the coupons are valid obligations of

1885.]

Opinion of the Court—Mr. Justice Field.

the city and county; that there is due by it upon each of them the sum of thirty dollars, with interest from the date of its maturity at the rate of seven per cent. per annum; that the city and county pay the amount thus adjudged due from the special tax to be annually levied, assessed and collected for that purpose, pursuant to the act of the legislature of April 1, 1872; and that the plaintiff recover against it for the costs of this action.

The validity of the bonds, to which the coupons are attached, and, of course, the validity of the coupons also, depends upon that act, and the compliance in their issue with its requirements. The object of the act was to open and establish a public street in the city and county of San Francisco, to be called Montgomery avenue, and to take private lands therefor. It described a strip of land by metes and bounds, and declared that it was taken and dedicated for such street, and that when paid for, the title thereto should vest in the city and county for that purpose, as the title of other public streets was vested. It provided that the value of the property taken, the damages to improvements thereon, or adjacent thereto, and all other expenses incidental to the proceeding, should be considered the cost of the opening of the avenue, and should be assessed upon lands within a described district in proportion to the benefits accruing therefrom, to be ascertained by a board of public works created for that purpose. That board was to consist of the mayor, the tax collector and the surveyor of the city and county of San Francisco; and, whenever the owners of a majority in frontage of the property, which was to bear the burden of the improvement, as they were named in the last preceding annual assessment roll for the state, city and county taxes, should petition the mayor of the city and county, in writing, for the opening of the avenue according to the provisions of the act, the board was to proceed to organize by the election of a president, and then to the performance of its prescribed duties. It was, among other things, to ascertain and report the cash value of the land taken; and the damages caused to the property along the line and within the course of the avenue; also, the benefits

Opinion of the Court—Mr. Justice Field.

[August,

accruing from its opening to the lots within the prescribed district.

The report was to remain at the office of the board for thirty days for the inspection of parties interested, and notice that it was thus open for inspection was to be published for twenty days in two daily papers in the city and county. Any person interested who was aggrieved by the action of the board, *as shown in its report*, might, within the thirty days, apply by petition to the county court, setting forth his interest in the proceedings, and his objections thereto, for an order on the board to file with the court its report, with such other documents or *data* as might be pertinent thereto, which were used by it in preparing the report. And the court was authorized to hear the petition, and the board could appear in response to it, and testimony could be taken in the matter. After hearing and consideration, it was in the discretion of the court to approve and confirm the report, or to refer it back to the board, with directions to alter or modify it in specified particulars. From the order of the county court, an appeal could be taken to the supreme court of the state, to review the matters complained of. Upon the final confirmation of the report, the board was required to prepare and issue bonds in sums of not less than one thousand dollars each, for the amount necessary to pay and discharge all the damages, costs and expenses incurred. The bonds were to be known and designated as the "Montgomery avenue bonds," and made payable in thirty years from their date, and to bear interest at the rate of six per cent. per annum, payable semi-annually at the office of the treasurer of the city and county. Coupons for the interest were to be attached to each bond. The bonds were to be signed by all the members of the board, and its seal was to be affixed to each. The coupons were to be signed by the president.

Any person to whom damages for lands were awarded, upon tendering to the board a satisfactory deed of conveyance of the property to the city and county, was entitled to have bonds issued to him equal to the amount awarded. The act also provided for the assessment and levy of an an-

1885.]

Opinion of the Court—Mr. Justice Field.

nual tax upon the property benefited, for the payment of interest upon the bonds, and to create a sinking fund for the redemption of the principal, the assessment to be "adjusted and distributed according to the enhanced values" of the respective parcels of land, as fixed in the final report of the board.

But the act declared that the *city and county of San Francisco should not, in any event whatever, be liable for the payment of the bonds, nor any part thereof, and that any person purchasing them, or otherwise becoming the owner of any bond or bonds, accepted the same upon that express stipulation and understanding.*

The following is a copy of one of the bonds and coupons issued under the act. The others are similar in form, differing from each other only in their number.

STATE OF

CALIFORNIA

BOARD OF PUBLIC WORKS.

City and county (Number 205) San Francisco.

(Vignette.)

\$1,000

MONTGOMERY AVENUE BOND.

\$1,000.

In Conformity

with an act passed by the people of the state of California, represented in senate and assembly, entitled "An act to open and establish a public street in the city and county of San Francisco to be called Montgomery avenue and to take private lands therefor, approved April 1, 1879," the treasurer of the city and county of San Francisco, state of California, will pay at his office in said city and county, to the holder hereof, one thousand dollars in United States gold coin, with interest at the rate of six per cent. per annum, payable semi-annually in like gold coin, upon surrender of the corresponding coupons, and that the principal sum is redeemable within thirty years from the date of these presents.

It being understood and agreed that this bond may be redeemed by said treasurer as provided in said above mentioned act of the legislature of the state of California.

Opinion of the Court—Mr. Justice Field.

[August,

In witness whereof the mayor, the tax collector and city and county surveyor of said city and county of San Francisco, composing a board of public works, have respec-

{	Seal of the Board of public works	}	tively signed these presents and the president of the board of public works has signed the annexed coupons as of the first day of January, 1873.
---	--------------------------------------	---	--

WILLIAM ALVORD,
President of the board of public works and mayor of the city and county of San Francisco.

ALEXANDER AUSTIN,
Tax collector and member of said board of public works.

RICHARD H. STRETCH,
City and county surveyor and member of said board of public works.

\$30. Board of Public Works. Coupon No. 15.

Montgomery Av. Bond. M. A. B.	}	The treasurer of the city and county of San Francisco will pay bearer at his office, thirty dollars, six months' interest.
-------------------------------------	---	--

On bond. No. 205.	}	{ Due 1st January, 1881.
----------------------	---	-----------------------------

WM. ALVORD,
President of board of public works.

From this brief statement of the act of April 1, 1872, three things distinctly appear: 1st, that the petition of the owners of a majority in frontage of the property to be charged with the cost of the improvement was essential to the validity of all subsequent proceedings taken for the opening of the avenue, including, of course, the issue of the bonds; 2d, that in no event could the city and county be held liable on the bonds, and necessarily, therefore, not on the coupons attached, and 3d, that every person purchasing or becoming the owner of any bond took the same on that express stipulation and understanding.

1885.]

Opinion of the Court—Mr. Justice Field.

The act in question was before the supreme court of the state, and the subject of exhaustive consideration in *Mulligan v. Smith*, 59 Cal. 206. That was an action of ejectment to recover land claimed by the plaintiff under a deed executed to him upon a sale of the premises for the non-payment of a tax levied thereon to raise a fund to pay the interest on the bonds. In the lower court, evidence was introduced which tended to show that the petition to the mayor, which was the essential initiatory step to the proceedings for opening the avenue, had not been signed by the owners of a majority in frontage of the property to be charged, as shown by the names on the assessment roll of the previous year; and the court found that such was the fact. In the supreme court, it was contended, as it had been in the court below, that evidence to impeach the correctness of the petition in this respect was inadmissible; and, also, that as the petition was sufficient on its face, and had been accepted by the mayor as sufficient, the defendant was estopped from questioning its validity, or the validity of the proceedings under it; and, also, that such estoppel followed from the judgment of the county court confirming the report of the board. But the supreme court held the evidence admissible, and that the defendant was not estopped from showing the insufficiency of the petition, either by the action of the mayor in accepting it, or the judgment of the county court; that whilst it might be true that the mayor was called upon in the first instance to decide upon the sufficiency of the petition, there was nothing in the statute which made his determination conclusive, and precluded an inquiry into its validity whenever the proceedings under it came up for judicial consideration. In no part of the statute, said the court, did it appear that provision was made for notice to the property owners of the proceedings authorized to be taken before the mayor or by the board or in the county court. Neither the mayor nor the board was required to give notice of any kind until the board had completed the report of its work. And the notice then required was one of a general nature by publication, and was only that the report was open for inspection. Though any property owner

aggrieved by the action or determination of the board, as shown in its report, could have made his objections to the county court, they could not extend to the character or sufficiency of the petition. "Nowhere in the statute," said the court, "is the petition made part of the report or of the *data* or documents used in making it. Nor is it anywhere required that the board or the mayor shall return it to the court or file it there or elsewhere. The court had, therefore, no jurisdiction of the petition; no power to adjudge upon its execution, and it could not assume jurisdiction of it or by its judgment decide upon its sufficiency and validity so as to conclude the defendant." These conclusions of the court were concurred in by all its members, and sustained in separate opinions of marked ability and learning by three of them. All agreed that evidence to show the defect in the petition, in not being signed by owners of a majority in frontage of the property to be charged, was admissible, and that the defect existing invalidated all the subsequent proceedings. "When, therefore," said the court, "the legislature prescribed that a petition from the owners of a majority in frontage of the property to be charged with the cost of the improvement was necessary to set the machinery of the statute in motion, no step could be taken under the provisions of the statute until the requisite petition was presented. It was the first authorized movement to be made in the opening of the avenue. When taken, officers, who were to constitute and organize a board of public works, were authorized to organize. Until it was taken, they had no such authority. They could not legally act at all; or, if they acted, their proceedings would be unauthorized and void. The presentation of the petition required by the statute, was, therefore, essential."

The authorities, cited in the several opinions, show that similar conclusions have been reached by the highest courts of other states, in analogous cases. Indeed, the rule is fundamental, that where private property is to be taken for a public improvement upon the petition of a majority of those who are to bear its burden, the petition of such a majority must be made before proceedings for the appro-

1885.]

Opinion of the Court—Mr. Justice Field.

priation of the property can be had. This is a condition which must be strictly followed. A failure to comply with it will vitiate all subsequent proceedings. No one, indeed, would contend that proceedings had, in such cases, without the petition of any of the owners, would be valid; and a petition of a less number of the owners than that designated by the statute, would be equally ineffectual. If one less than the required number may be omitted, so may all. Nor is the rule at all affected by the doctrine that in a certain class of cases, evidence of such compliance is conclusively found in the action of officers required to consider and determine that fact. That doctrine, as we shall presently see, only applies to estop the obligors of a bond, and can have no bearing or consideration in the present case, where the bonds, to which the coupons in controversy are attached, are neither in form nor in law the obligations of the city and county.

The construction given by the supreme court of the state, to the act of April 1, 1872, if not absolutely binding upon the judges of the federal courts in cases arising under it, is certainly not to be disregarded and rejected except for the most cogent and persuasive reasons, such as would leave little doubt of the error of the state court. Conflicts between state and federal tribunals, in the interpretation of state statutes, are always to be avoided if possible. The federal courts will, therefore, follow the exposition of the state courts, unless it conflicts with, or impairs the efficiency of some principle of the federal constitution, or of a federal statute, or a rule of commercial or general law. In this case, there is no such conflict or impairment. No principle of federal law is invaded, or rule of commercial or general law disregarded. The construction given, is one we should unhesitatingly adopt, had the supreme court, the legitimate expounder of state statutes, never spoken on the subject.

There was, it is true, an intimation by one of the judges, in his opinion in *Mulligan v. Smith*, that in an action upon the bonds, that being an action upon contract, a different rule might exist, and that an estoppel might arise against the defendant. It was, however, only an intimation to mark a

possible distinction in the proofs required in the two forms of action. No question as to the effect of the bonds as evidence was before the court. And it is plain that if, to recover in the ejectment, it was essential to establish the validity of the proceedings leading to the levy of the tax to pay the interest on the bonds, it must be essential to establish the validity of the proceedings leading to the issue of the bonds themselves, and, of course, the sufficiency of the petition upon which the proceedings were founded, unless such sufficiency is, from the character of the instruments, and the recitals in them, to be conclusively presumed. In the ejectment case, a comparison of the petition with the assessment roll of the previous year disclosed the fact that a number less than the majority of the owners in frontage, as shown by the names on the assessment roll, appeared on the petition. The subsequent proceedings were, therefore, from this defect, wholly unauthorized. The essential initiative to them had never been taken.

The question here is, whether, assuming that an action will lie against the city and county on the coupons, will the sufficiency of the petition be presumed; or what will amount to the same thing, will the defendant be estopped from denying its sufficiency, so as to allow the admission in evidence of the coupons, without other proof than the production of the bonds to which they were attached.

There are numerous cases where municipal bonds have been authorized by statute, upon a vote of a majority of the citizens of a city, county, town, or other locality, and officers designated to ascertain and report as to the vote taken, and issue the bonds. When, in such cases, the bonds refer to the statute, and recite a compliance with its provisions, and have passed, for a valid consideration, into the hands of *bona fide* purchasers, without notice of any defect in the proceedings, the obligors have been held to be estopped from denying the correctness of the recitals. The doctrine on this subject is well stated by the supreme court of the United States in the recent case of *Pana v. Bowler*, 107 U. S. 539. "This court," is the language used, "has again and again decided that if a municipal body has lawful power

1885.]

Opinion of the Court—Mr. Justice Field.

to issue bonds, or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has the right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds by the authorities whose primary duty it is to ascertain it."

This doctrine is not accepted in many of the state courts, and has in some instances met with earnest dissent from judges of the supreme court. It must, however, be conceded that it is the settled doctrine of that court; but to its application the recitals must clearly import a compliance with the statute under which the bonds were issued. If fairly construed they are consistent with any other interpretation, they will not estop the municipal corporation, in whose name they are made, from showing that they were issued without authority of law: (*School District v. Stone*, 106 U. S. 186; *Supervisors of Carroll County v. Smith*, 111 U. S. 556.) And the recitals when full will estop only the obligors of the bonds; they cannot estop others who are not parties to them; they cannot affect strangers to the transaction. In both particulars the alleged recitals in the avenue bonds, are inoperative to create any estoppel against the city and county. There is no statement of any fact in the clause called a recital. The clause is a mere caption to an order or promise of the board of public works that the treasurer of the city and county of San Francisco will pay to the holder the sum of one thousand dollars. "In conformity with the act," the title of which is given, says the instrument, "the treasurer will pay." Read in connection with what follows, it imports that the treasurer will pay the amount designated in accordance with the act, that is, out of the fund to be provided by it, and that the holder can look to no other source of payment. There is nothing in the clause which would reach the petition and import that it had conformed to the requirements of the statute. But the fact which disposes of this question of recitals and any alleged effect attributed to them in the present case, is that the so-called bonds, to which the coupons in controversy were at-

Opinion of the Court—Mr. Justice Field.

[August,

tached, are not obligations of the city and county. They are not executed by it, or under its seal, or by its agents or officers, but by certain parties constituting the board of public works. The fact that certain officers of the city and county are made members of the board to appraise the property taken, and the injuries and benefits caused by the opening of the avenue, and to issue the bonds, does not constitute them agents of the city and county and render their work as such board or the bonds issued by them, the work or the bonds of the city and county; no more than if they were constituted a board to establish an university, and prescribe the studies to be pursued in it, would make them the agents of the municipality for that purpose. Agents can only exercise the powers of their principals; they cannot lawfully exceed them. Here the city and county as a municipality is not authorized to open the avenue, to appraise the value of the property taken, or the amount of injuries received by or benefits conferred upon the owners of property along the line of the avenue, or to sign and issue its bonds to the parties injured. In all these matters the board acts independently of the municipality. It is made the agent of the state to carry out a public improvement directed by its statute, and not the agent of the city and county. This branch of the case is more fully considered by my associate, and I concur in his views.

The foundation upon which the doctrine of estoppel from recitals in municipal bonds rests, is that the officers signing the bonds and inserting the recitals, are agents of the municipality, and authorized to bind it by their acts and representations. The principle, which gives rise to the estoppel, as well stated by the defendant's counsel, is that it would be inequitable to permit a municipal corporation to take advantage of the falsity of solemn declarations of such agents within the scope of their authority. But if the officers making the recitals are not such agents, there is no room for the doctrine of estoppel. Their recitals, on no conceivable principle, can in such cases bind the corporation.

It follows that if any action can be maintained upon the

1885.]

Opinion of the Court—Mr. Justice Field.

coupons against any defendant, the validity of the proceedings, upon which the bonds were issued, must be established by affirmative proof of the sufficiency of the petition, which was the essential initiative to them. But the question is not before us, whether an action can be maintained against any other party; it is enough that we are of opinion that the present action cannot be maintained against the city and county of San Francisco. The plaintiff asks for judgment that the coupons are valid obligations of the city and county; that there is due, by the city and county, upon each of the coupons, thirty dollars, with interest; that the city and county pay the amount thus adjudged due, out of the special tax to be levied under the act, and that the plaintiff recover his costs of the action. Such judgment could not be rendered upon the facts stated in the complaint. The statute to which the complaint refers, and upon which, alone, the judgment is sought, declares, in express terms, "that the city and county shall not, in any event whatever, be liable for the payment of the bonds nor any part thereof," and "that any person purchasing said bonds, or otherwise becoming the owner of any bond or bonds, accepts the same on that express stipulation and understanding."

As already stated, the so-called bonds, which, in fact, are only orders or promises of the board of public works that the treasurer will pay to the holder the amounts designated, cannot be the foundation of any liability of the city and county; and that such liability is sought to be charged, appears from the prayer for judgment, although the discharge of that liability is to be had out of funds to be raised by the special tax for which the act provided.

The asserted ground of the action is, that it is essential to establish the validity of the bonds, as a preliminary to an application for a *mandamus* to levy the special tax. Counsel assume that the validity of the bonds issued by one party can be determined in an action against another in no way named in them, nor liable for their payment. We do not so understand the law. We have not met with any adjudged case to that purport. On the contrary, we have always supposed that the party actually liable on a bond, must have

Opinion of the Court—Mr. Justice Field.

[August,

his day in court, in person, or by his representative, before a judgment determining its validity as against him or his estate, could be regarded as having any binding force. Such liability cannot be vicariously imputed to him, or charged upon his estate. If the action be to charge particular property, of which there is no representative, there is a defect in the law which the legislature, and not the courts, must supply.

It is true that in the enforcement of bonds of municipal bodies, which are to be paid from funds raised by taxation, general or special, the validity of the bonds must first be established by the judgment of the court, that is, the demand against the municipality on the bonds must be first carried into judgment; then a *mandamus* will issue, which is in the nature of an execution. It is the executory process for the enforcement of the judgment recovered. It can only issue to command the corporation against which the judgment is rendered, or its representatives or officers, to levy the tax prayed, just as an execution on an ordinary money judgment can only be issued against the property of the judgment debtor. Whether, when the judgment against the municipality is rendered, the writ is to direct a general or a special tax upon all or a portion of the property within its limits or only upon a particular class of property, real or personal, will depend upon the directness of the statute providing for the payment of the indebtedness created. The judgment, however, must, in all cases, be against the corporation to which, or to whose representatives or officers, the writ is directed. It is the liability of the corporation established by the judgment which is to be discharged by the levy of the tax prayed, and not the liability of any other body.

The several cases cited by counsel in support of their contention in no respect militate against these views, but, on the contrary, illustrate and confirm them. In all of them the bonds were issued in the name, or were in law the obligations, of the municipality against which the judgment was prayed, though in some of them the funds for the payment of the judgment were to be collected by a special tax

1885.]

Opinion of Sawyer, C. J., concurring.

upon the property of a particular district. It would serve no useful purpose to comment at length upon the cases in verification of this statement. Every one who may take an interest in the subject will find, upon examination of them, its correctness sustained.

One of the counsel of the plaintiff indulges in his brief in some strictures upon the action of the city and county of San Francisco, with respect to these bonds, characterizing it as "dishonest and dishonorable repudiation." The accusation falls harmless in the face of the statute under which the bonds were issued, declaring that the city and county "*shall, not, in any event whatever, be liable for the payment of the bonds, nor any part thereof,*" and "that any person purchasing said bonds, or otherwise becoming the owner of any bond or bonds, accepts the same upon *this express stipulation and understanding.*" Nor can the legislators of the city and county be subjected to any just imputation of a want of regard to the honor and credit of the municipality in refusing to order the levy of a tax to pay the interest on the bonds, so long as the judgment of the highest tribunal of the state, the constitutional expounder of its laws, remains unreversed, declaring that the proceedings on which the bonds were issued, were taken in disregard of the conditions imposed by the legislature, and, therefore, were absolutely null and void. If property of citizens has been taken and is retained for an avenue of the city without compensation upon proceedings not warranted by law, some other remedy must be sought by the parties injured than such as consists in affirming the validity of those proceedings in face of the judgment of that tribunal.

It follows from the views expressed that no recovery can be had upon the facts disclosed in the complaint; and the motion of the defendant to exclude all evidence in support of its allegations, must be granted; and it is so ordered.

SAWYER, Circuit Judge, concurring. This case having been regularly called for trial, the plaintiff offered in evidence the bonds and coupons set out in the complaint, to the introduction of which the defendant objected, on the

Opinion of Sawyer, C. J., concurring.

[August,

ground that the complaint does not state a case sufficient to justify the introduction of any evidence whatever; or, in other words, that the facts stated in the complaint do not make a case which entitles the complainant to any judgment or relief against the defendant, or upon which the defendant is in any respect liable to be sued. The counsel of both parties treated the objection as, in effect, a demurrer to the complaint, on the ground that the facts set out, taken as true, do not constitute a cause of action, and they argued the question very elaborately on that hypothesis.

The first question that meets us at the threshold of the discussion, is, whether the defendant—the municipal corporation, the city and county of San Francisco—is, in any sense, the obligor on the bonds, or whatever the instruments in suit may be properly termed; or whether it is in any way a party to the transaction out of which these instruments arose, in such sense as to cast any liability or duty upon the municipality in its corporate capacity.

In my judgment, the instruments sued on are not bonds of the city and county of San Francisco, and the city and county of San Francisco, in its corporate capacity, does not stand in any such relation to these obligations, as renders the corporation liable to be sued upon them for any purpose.

The act under which the instruments sued on purport to have been issued, is not an amendment of the city charter, and it does not purport to enlarge the powers or duties of the corporation, or of its officers, in their capacity as officers or agents of the corporation. It does not confer any authority whatever upon the corporation to do any act, in its corporate capacity, or impose any duty or obligation upon the municipality relating to the opening and dedication to public use of Montgomery avenue. The corporation is not authorized to do the acts necessary to the opening and dedication of the street to the public use contemplated by the act, or required to see that the cost of the work, upon completion, shall be collected or paid; in short, the corporation, as such, is neither required nor authorized to perform any act in relation to the opening and dedication of

1885.]

Opinion of Sawyer, C. J., concurring.

the avenue, or in relation to payment therefor, when accomplished. Clearly, it seems to me, the state has undertaken to do this work through the instrumentalities chosen by itself, of which instrumentalities the corporation called the city and county of San Francisco is not one. Some of the officers of the city, it is true, are designated as instrumentalities for carrying out the scheme provided for, but in carrying it out they do not act by virtue of any authority derived under the charter of the corporation, or any act amendatory of the charter, or enlarging its powers, or under the authority of the corporation, but they act solely by authority of the act in question, independently of any act of the corporation, their designation by their official titles being only *descriptio personarum* to indicate the particular parties chosen for the work.

The act described a specific tract of territory, within the city and county of San Francisco, by metes and bounds, and then declares that "it is hereby taken and dedicated for an open and public street, and *when paid for as hereinafter provided*, the title thereto shall vest in the said city and county for such purposes forever, as the title of other public streets, in said city and county, now is vested." This, with a provision for subsequent improvement and care, is the only one in the whole act in which the city and county, in its corporate capacity, is brought into any relations with the improvement contemplated; and this relation only commences after the work of dedication is fully completed, *and paid for*, by the agencies and in the manner appointed by the act. The expenses of dedication to public use, and opening the avenue, are to be paid for by assessments on a district of land, specifically described and designated by the act as benefited by the improvement. The board of public works provided for is not a board of public works of the city and county of San Francisco, with powers derived under the charter of the city, or any act enlarging those powers, or acting by authority of the corporation or its charter. It is not one of the branches of the municipal government.

This board is a special board of public works, created by

Opinion of Sawyer, C. J., concurring.

[August,

the statute, without any reference to the powers and duties of the corporation, to carry out this particular improvement, undertaken by the state, without reference to or any action of the corporation, and without consulting its pleasure. It is, it is true, composed of three persons, who are also officers of the corporation, and their official name is used to designate the individuals who are to constitute the board. But their individual names might just as well have been used, or any other three persons, having no connection with the corporate government, might have been appointed to perform precisely the same acts; and had this been done, there would be just as good ground for considering them agents of the corporation, and not instrumentalities employed by the state itself to carry out its purposes, as there is, now, to consider the board as an agent of the municipality, and not as an instrumentality of the state. Doubtless, the legislature might have enlarged the powers of the corporation, or conferred the authority, or imposed the duty, upon it, to perform the contemplated work, but it did not see fit to do so. "The mayor, tax collector and city and county surveyor," of the city and county of San Francisco—that is to say, the persons who for the time being fill those offices—are "created a board of public works, within the meaning and intent of this act, and as such board are hereby authorized, empowered and directed to perform all and singular the duties herein enjoined upon the board of public works, as herein provided." A salary of two thousand dollars per annum is allowed to each for his services in such board, payable out of the "Montgomery avenue fund," to be assessed upon the property benefited, as a part of the expenses of the opening of the avenue. Section 25 provides that, "the board of public works shall provide itself with an *official seal*, which shall be used to verify such acts of the board as are herein described to be done, under the seal of the board;" thus, apparently, making it an independent corporation, or *quasi* corporation, for the purposes of the act.

Section 8 requires the board, at the proper stage of proceedings, to prepare and issue bonds for an amount in

1885.]

Opinion of Sawyer, C. J., concurring.

the aggregate "necessary to pay and discharge all said damages, costs and expenses." "Said bonds shall be known and designated as 'Montgomery avenue bonds,' and the bonds shall be signed by all the members 'of the board,' and the seal thereof shall be affixed to each bond." There is nothing to authorize the issue of bonds by or in the name of the municipal corporation. They are to be issued by the board specially created for the purpose, under its own seal, provided for by the act, and not under the seal of the municipal corporation, and not signed by the mayor as mayor or agent of the city. Under section 11, a fund sufficient for the purpose for payment of coupons and redemption of the bonds is to be levied, assessed and collected. "in the same manner as other taxes in said city and county are levied, assessed and collected upon lands within the district supposed and determined by the act itself, to be benefited." Thus, the same machinery and instrumentalities used for collecting *other state*, as well as city, taxes, are adopted for assessing and collecting the special tax provided for the purposes of the act. The moneys so collected are to be paid, not into the *treasury* of the city and county, as a part of its corporate funds, but to the *treasurer* of the city and county personally designated for the purpose, and is "to constitute the Montgomery avenue fund," "to be paid out by said *treasurer only* in payment of the coupons attached to said bonds, * * * and "in redeeming the bonds issued in pursuance of the provisions of this act."

The fund thus provided is set apart for this specific purpose, having no connection with the funds of the municipality, under the sole charge and management of the board of public works, and the person who happens, for the time being, to be treasurer. The municipal corporation, as such, has no power or authority over it—nothing whatever to do with it. Nor has the board of supervisors, the legislative and governing body of the corporation. It is under the exclusive authority and control of the agents of the state, especially designated by the act, to carry out the will and purpose of the state, as manifested by the act.

As if not enough to declare its purpose to make the im-

Opinion of Sawyer, C. J., concurring.

[August,

provement, to designate its own instrumentalities, and point out the mode of executing its will, leaving nothing to be done on the part of the corporation, or of its legislative and governing body, and to carefully avoid bringing the corporation or its legislative body into any relations whatever with the work; and as if to cut off all possibility of doubt upon the subject, it was expressly provided in the last section, but one, of the act, "*that the city and county of San Francisco shall not in any event whatever, be liable for the payment of the bonds, nor any part thereof, provided to be issued under this act; and any person purchasing said bonds, or otherwise becoming the owner of any bond or bonds, accepts the same upon that express stipulation and understanding.*" Thus the statute in no provision, authorizes the city and county of San Francisco, in its corporate capacity, or by the board of supervisors, its legislative and controlling body, or otherwise, to do anything in the matter of opening and dedicating to public use, Montgomery avenue, or to meddle with the funds provided for the purpose, or to assume any obligation or responsibility in the matter. The act imposes no obligation or duty upon the corporation or upon its controlling body, nor does it even confer any power to act, in any manner, in regard to the work of opening Montgomery avenue, while, on the contrary, it expressly provides that it "*shall not, in any event whatever, be liable for the payment of the bonds, nor any part thereof, provided to be issued under this act.*"

The act does not authorize the issue of any bonds of the corporation, and the board of public works must have so understood the statute, for it did not, in fact, issue any such bonds. The instruments, set out in the complaint, neither in substance, in form nor in law, can be regarded as bonds of the city and county of San Francisco. They do not purport, upon their face, to be such, and there was no authority in the board to make them such. The only provisions in the whole act which bring the municipal corporation, in its corporate capacity, into any relations with the opening of the avenue, are the provisions in sections 1 and 16, relating to its disposition, after the work is both done

1885.]

Opinion of Sawyer, C. J., concurring.

and paid for, as provided in the act—after the will of the state has been carried out, and the purpose of the act fully accomplished. The provision of section 1, is, that the land described, “taken and dedicated for an open public street,” *“when paid for, as hereinafter provided, the title hereto shall vest in said city and county for such purposes forever, as the title of other public streets in said city and county, is vested.”* Thus, after opening and dedicating the avenue to public use, and *paying for it*, in the manner provided, which was the task assumed to be performed by the state, the street is donated to the city; and until all this is fully accomplished, the city, in its corporate capacity, has nothing at all to do with the matter. And then, as a consideration for opening and dedicating the land for the avenue, procuring and vesting the title in the city and county, section 16 imposes an obligation on the corporation to thereafter sewer, grade, sidewalk, plank or pave the avenue, as in the case of other streets already dedicated to public use. The provision is, “The said Montgomery avenue, *when opened*, shall be sewered, graded, sidewalked and planked and paved by the municipal authorities in accordance with the rules, regulations, statutes and ordinances applicable to the other public streets of the city and county of San Francisco.”

Thus the state assumes the duty, and work of dedicating and opening Montgomery avenue, and providing for payment by a fund assessed upon the property determined by itself to be specially benefited by the improvement, and, when its task is fully accomplished, turns the avenue over to the municipal corporation, to be thereafter improved under its direction and authority in the same manner as other public streets are improved, in pursuance of the powers conferred on it by its charter. And, until the avenue was thus opened, and turned over to the municipality, the city and county, through its legislative controlling body, or otherwise, had no corporate control over, or relation to, the matter, and had nothing to do with it.

These bonds were issued in connection with that portion of the work assumed by, and carried on, exclusively by the

Opinion of Sawyer, C. J., concurring.

[August]

state, and under its direction, and with which the corporation had no concern.

The board of public works, and other parties designated by the Montgomery avenue act, to perform the duties therein indicated, performed such duties, solely by authority of that act. The duties were not performed by virtue of any authority of the municipal charter, or of any other act conferring power or authority upon the municipal corporation. The consent of the corporation was in no way obtained or asked. The acts were solely performed in pursuance of the express direct command of the statute itself, wholly irrespective of the will or the charter powers of the corporation. They were not performed in the exercise of corporate powers, and they were in no sense corporate acts. The authorities are numerous, establishing the proposition, that parties so acting by express direction of the statute, without the authority of the municipal corporation, and not acting by virtue of the powers conferred on the corporation by its charter, do not act as officers or agents of the corporation, and the corporation not being the principal, their acts are not the acts of the corporation; they are but the agencies employed by the directing power, for the accomplishment of its own purposes.

The following are some of the authorities establishing this self-evident proposition; and it will be sufficient to cite the cases without analyzing or commenting upon them in detail: *Sheboygan County v. Parker*, 3 Wall. 96; *Horton v. Town of Thompson*, 71 N. Y. 521; *Board of Park Commissioners v. Detroit*, 28 Mich. 244-5; *People, etc., v. Chicago*, 51 Ill. 17; *Hoagland v. Sacramento*, 52 Cal. 149; *Tone v. Mayor*, 70; N. Y. 165; *N. Y. and B. S. M. and L. Co. v. Brooklyn*, 71 N. Y. 584. In *Horton v. Town of Thompson*, *supra*, the court said: "In the present case no action on the part of the town in its corporate capacity, or on the part of any of its officers, was required by the act, or was taken. The money was to be borrowed and the bonds issued by commissioners to be appointed in the manner prescribed by law. These commissioners were in no sense town officers, nor did they represent the town." (p. 521.)

1885.]

Opinion of Sawyer, C. J., concurring.

The strongest case cited in opposition to the views expressed, and to support the position that the opening of Montgomery avenue was a municipal, and not a state, undertaking, for which the municipal corporation is liable, is that of *Sage v. City of Brooklyn*, 89 N. Y. 189. But there were several clauses in the statute involved in that case, upon which the court relied, and rested its decision, that are wholly wanting in the Montgomery avenue case. "Thus," says the chief justice, who delivered the opinion of the majority of the court, "by the third section it is declared, that the lands '*shall be deemed to have been taken by the city of Brooklyn for public use*.'" Id. 197. "That the improvement of Sackett street was regarded by the legislature of the state, as a city, and not a state, improvement, also plainly appears from the supplementary act, chapter 592, Laws of 1873. The park commissioners were, by that act, authorized and directed to improve Sackett street by grading, paving, planting shade-trees, constructing carriage-ways, etc., and by the fourth section the city was required to issue its bonds for the purpose of raising money to pay the expenses of the improvement, and the money collected on the assessment was directed to be paid to the commissioners of the sinking fund, for the redemption of the bonds." (Id. 198.) Thus, by the express terms of the statute, the land was "*deemed to be taken by the city*," and the city was expressly made *primarily liable*, and required to issue its own bonds, and reimburse itself from assessments on the property benefited. There is nothing of this kind in the Montgomery avenue act, and nothing even looking in that direction. So, also, referring to section 16, of another act, as applicable, the chief justice says: "The direction of section 16, that the comptroller shall pay the land damages, is *absolute and unqualified*. It is not a direction to pay them out of the assessments when collected, or out of any particular fund." (Id. 199.) Again: "The city, under that statute (supplemental act of 1873), was required, *primarily*, to advance the necessary fund. The provision in the act of 1873 furnishes a strong inference, in favor of the claim, that the legislature, by incorporating section 16 of the charter into the act of 1868,

Opinion of Sawyer, C. J., concurring.

[August,

intended to impose upon the city the duty, either primary or ultimate, of paying the landowners." (Id. 200.) On these, and other similar provisions, the decision was rested. Yet, in the face of these strong provisions of the statutes, showing that the acts in question were intended to be municipal, and not state acts, and expressly imposing the liability on the city, those two able judges, of long service and ripe experience, Earl and Rapallo, dissented, in a clear and cogent opinion, and held the work to be a state, and not a municipal, work, for which the corporation was not liable. Said Mr. Justice Earl in this case: "The land was taken and appropriated by the direct act of the legislature, and, by the same act, the park commissioners were appointed to enter upon the land, and make the improvement. They were not agents of the city, but state agents. They were not officers of the city, and, in what they did, they did not represent the city, and had no authority in any way to bind it, and could in no way make it responsible for these awards. They had the precise authority conferred upon them by the act, and no other; and the liability of the city for their acts, or, for the land taken, or awards made, is not so much as hinted at by the act."

"For the position, that the park commissioners were not agents of the city, for whose acts the city could be made responsible, the cases of *Maxmillian v. The Mayor*, 62 N. Y. 160; *Tone v. The Mayor*, 70 Id. 157; and *New York and Brooklyn Saw-mill and Lumber Co. v. The City of Brooklyn*, 71 Id. 580, are abundant authority. The general rule, as deduced from these cases, is that a municipality is not liable for the acts or omissions of an officer in respect to a duty specifically imposed upon him which is not connected with his duties, *as agent of the corporation*, and that such a corporation is only liable for the acts or omissions of officers in the performance of duties *imposed upon the principal*." Id. 204.

But, conceding the case to be well decided, the court, in its decision, rested upon express provisions of the statute, making the city of Brooklyn responsible, and the case now in hand is entirely different. There is no such provision in

1885.]

Opinion of Sawyer, C. J., concurring.

the Montgomery avenue act. That act is, absolutely, barren of any such or similar provisions.

The other cases apparently most confidently relied on to show the liability of the city are *Jordan v. Cass county*, 3 Dill. 185, and *Davenport v. County of Dodge*, 105 U. S. 238. The bonds in the former case were issued by the county in the name of the county, by express direction of the statute. In the latter case the bonds were issued by the county commissioners, the governing body of the county, in pursuance of an express provision of the statute, for a precinct indebtedness. It was held by the supreme court, following the construction adopted by the supreme court of Nebraska, that the county was liable upon the bonds under the statute authorizing the issue of county bonds, for the precinct indebtedness, but it was held that the indebtedness was to be satisfied out of the funds collected from the precinct. In *Meath v. Phillips County*, 108 U. S. 555, the supreme court, referring to this case and the case of *Cass County v. Johnson*, said: "In the case of Cass county, the law provided in terms for an issue of bonds in the name of the county; and in that of the county of Davenport, we construed the law to be, in effect, the same. Consequently there were, in those cases, obligations of counties, payable out of special funds." These cases are, therefore, entirely different from the case under consideration. On the contrary, the case of *Meath v. Phillips County*, just cited, is decisive in favor of the proposition maintained in this opinion—that where the state, or some other district or organization, employs certain officers, designated by their official names, of a city or county, in pursuance of the statute, as agents or instrumentalities for accomplishing their own proper purposes, such officers, in performing the acts thus required, do not act as officers or agents of such city or county, but as agents or instrumentalities of the state, or other district or organization for which the services required by the statutes are performed. 108 U. S. 554-5.

It is clear to my mind, both upon principle and authority, that the city and county of San Francisco is not, in substance, or in form, an obligor on, or party, in any sense,

Opinion of Sawyer, C. J., concurring.

[August,

to the bonds and coupons sued on; that under the Montgomery avenue act it could not have been, legally, made an obligor on, or party to, the bonds issued in pursuance of the act; and that, in its corporate capacity, it has no relation to those bonds, and no duties to perform in connection therewith. The duties to be performed, whatever they may be, in connection with the bonds and coupons in suit, by parties who are also officers of the city and county of San Francisco, are in my judgment, to be performed by them under the provisions of the statute, as agencies or instrumentalities of the state, and not as agents or officers of the city. It follows, necessarily, that the city and county of San Francisco, in its corporate character, is, in no respect, chargeable with any liability, of any kind, upon the instruments sued on.

There being no liability of any kind, and no duty to perform by the municipality in its corporate capacity in relation to said instruments, no action, or judgment, can be rendered in the case that could avail anything as a foundation for proceeding by mandamus to compel the assessment and collection of a fund, for the payment of the coupons, and ultimate redemption of the obligations in question. For that, or any other purpose, looking to the collection of the money claimed to be due, the action might, just as properly, be brought against the city of Oakland as against the city and county of San Francisco.

The property holders of the district liable to be assessed, under the Montgomery avenue act, with respect to their lands, and the indebtedness in question, do not, under the act, stand, in any respect, in privity with the corporation—the city and county of San Francisco—and in relation to the instruments in suit, the municipality does not represent either the owners or the lands. Any judgment against the city, in this action, could not bind or conclude the owners or their property, neither being, in any sense, parties, or privies to parties, to the suit. The judgment, under such circumstances, could not afford any valid or legal foundation for proceedings by mandamus against the parties charged with the duty of assessing and collecting the Mont-

1885.]

Opinion of the Court—Sawyer, C. J.

gomery avenue bond tax; for, in that capacity, they are not officers, agents or instrumentalities of the municipal corporation; and they are not in privity with it. A mandamus, in the national courts, is in the nature of process, to execute a valid judgment; and it must be against the judgment debtor, or obligor, or some one representing the judgment debtor, or obligor. A proceeding, by mandamus, against the parties charged with assessing and collecting the tax in question, based upon a judgment in this case, would be very much like proceeding by an execution against B, to satisfy a judgment against A, between whom there is no legal relation whatever, affected by, or affecting, the judgment.

If the views expressed are sound, the complaint presents no cause of action against defendant, and the facts alleged, and offered to be proved, are wholly immaterial.

It would be but a waste of time to occupy the attention of the court in taking testimony which cannot prove, or tend to prove, any valid cause of action. The complaint is wholly insufficient, and the pleadings present no material issue. For the reasons stated in this opinion, and in the opinion of the presiding justice, in which I concur, the objection to the introduction of the evidence offered must be sustained.

IN RE SUN HUNG AND SI YEE.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 24, 1875.

1. **APPEALS—HABEAS CORPUS.**—Under section 764 R. S., amended by the act of March 3, 1885, (Session Laws, 1885, 437) the right of appeal in *habeas corpus* cases is absolute, and not dependent upon the discretion of the judge, to allow, or deny, an appeal.
2. **CHINESE RESTRICTION ACT.**—Policy of allowing appeals on questions of fact, arising under the Chinese restriction act, discussed, and limitations on the right of appeal suggested.

Before SAWYER, Circuit Judge.

Mr. J. C. B. Hebbard, for the petitioner.

SAWYER, Circuit Judge. This is an application for the allowance of an appeal to the supreme court, under the

recent act of congress giving an appeal in these cases. The case was brought to this court by appeal from the district court, and the appeal is on a question of fact, whether these two parties were born in the United States. The testimony is, extremely, slender, and uncorroborated, and the judgment in the district court, was, therefore, affirmed.

The act is very general, and comprehensive, in its provisions, and I was in doubt, whether the right of appeal is absolute, or whether I have any discretion to refuse to allow the appeal. Had I the discretion, I, certainly, should deny an appeal in this case. I think it is a case with which the supreme court should not be troubled. I do not think there is enough in it, to justify taking it up. There is no question of law involved. If there is no discretion in these cases, every case of *habeas corpus*, of this character, whichever way decided, can go to the supreme court on appeal. Upon examination, I have come to the conclusion, that I have no discretion in the matter, and that, the right of appeal is absolute. I think the act must have passed without due consideration, without appreciating the effect or the consequences of an unlimited right of appeal. There should, in my opinion, be an appeal in some cases. A petitioner ought not, always, to be compelled to wait until the judges disagree. Very important questions arise under the Chinese restriction acts; which the judges, themselves, are not clear upon, in which there ought to be a decision of the supreme court of the United States, and in which the judges, earnestly, desire such a decision. These acts involve international considerations and international questions of the highest importance, but in my judgment, there should be some limit to the right of appeal, in these matters. Perhaps the right ought not to rest upon the discretion of the judges, who have tried the cases, because, it would be a delicate matter for them, in some cases, to deny an appeal from their own judgments. Certainly, in addition to an appeal, where there is an opposition of opinion in this class of cases, wherever a judge finds a question of law, upon which he is not clear, he alone, in my judgment, should be entitled to certify that question up, for final decision of the

1885.]

Opinion of the Court—Sawyer, C. J.

supreme court, where the matters are of such importance as are often involved in the construction of the Chinese restriction acts. There have been several questions raised before, and decided by me, which I should have been very glad to certify up, and should have certified up, for an authoritative decision of that tribunal, had I been authorized to do so.

I think there should be no appeal on a mere question of fact, unless there is additional testimony to be taken before the supreme court. In this class of cases the judge who hears the evidence, and sees the witnesses, is, certainly, in a much better situation to determine a question of fact than the supreme court could be, on the written record of what occurs before the court of original jurisdiction. On the question of fact, it seems to me, there ought not to be an appeal. However, congress may think otherwise. I merely make the suggestion on the question of policy. On an important question of law affecting the rights, and liberty of parties under the constitution, and laws of the United States, on which, any judge entertains a reasonable doubt, and which he thinks should be determined by the supreme court, there, certainly, should be an appeal. Where the judge has decided the case, and feels confident of the correctness of his decision, there should be some such limitation as this: The party appealing, should be required to present a copy of the record, and an assignment of alleged errors, to one of the justices of the supreme court, for his examination, to see whether the appeal is frivolous, or whether there is really anything in it, that justifies the allowance of an appeal; and such justice should have some discretion in the matter of allowing an appeal.

There, certainly, could be no objection to entrusting that discretion to a justice of the supreme court, whatever objection there might be, to entrusting such power to the court, that heard the case. Such a rule is prescribed by the recent act authorizing writs of error in certain criminal cases, to remove them from the district court to the circuit court. In such a case, the party, who desires the writ of error, is compelled to prepare a copy of the record, and lay

Opinion of the Court—Sawyer, C. J.

[August,

it before the circuit judge of the court to which the case is to be taken, for review, and if he deems it to present a question of sufficient doubt, to justify a hearing in the appellate court, he is authorized to allow a writ of error. I have had occasion to pass upon several cases of the kind, and to deny the writ in some, as frivolous. If the judge thinks the application frivolous, and there is no point worthy consideration, he is authorized to deny the writ. I see no good reason why a similar provision should not be made applicable, at least, to the justice of the supreme court, so that when the circuit court has decided for, or against, a petitioner on *habeas corpus*, the parties feeling aggrieved should take the record to a justice of the supreme court, and allow him to determine whether the appeal is frivolous, or whether there is some real question, that is worthy consideration, and give him discretion to allow, or deny, the appeal, as he deems the justice of the case requires. Such a provision, with the limitation that there should be no appeal on questions of fact, would, perhaps, afford the proper remedy.

Viewing this question as I do, and believing the right of appeal to be absolute, and that I have no discretion in the matter, I allow the appeal, and shall fix the bail bond at two thousand dollars, with a bond of three hundred dollars to cover costs.

In the case of Ty Moy on appeal, which is an application of a similar character, the appeal will be allowed, and the same bonds fixed.

On the day following the allowance of the appeal, the attorneys of the parties being present, the circuit judge made the following, additional, observations:

I desire to add some observations, to what I said, on yesterday, in this case.

In allowing the appeal, the opinion was expressed that there ought to be no appeal, on a question of fact. It has since occurred to me, that, in view of the object and policy of the law, perhaps, it might be held, without a very greatly overstrained construction of the statute, that the appeal,

1885.]

Opinion of the Court—Sawyer, C. J.

only, lies, upon questions of law. Undoubtedly the principal object of the statute, is, to procure an authoritative construction of the constitution, law, or treaty, under which the question arises, and they protect the legal rights of the petitioner; and, if I could see my way clear, I should limit appeals to cases presenting questions of law, only. But, as, was stated yesterday, the language of the statute is very broad and comprehensive. Combining the two provisions of the statute into one, it reads: "From a final decision of such circuit court, an appeal may be taken to the supreme court," "in the case of any person, alleged to be restrained of his liberty, in violation of the constitution, or of any law, or treaty, of the United States." This is "a case" in which such restraint is alleged; and the statute does not, in terms, nor by plain inference, limit the appeal to the legal points involved in "the case."

The law points in this case, had they been reached, under the settled decisions, so far as the courts of this circuit can settle them, would have been decided in favor of petitioners. It was held in *Look Tin Sing's case*, 10 Sawy., 253, and 21 Fed. Rep., 905, Mr. Justice Field delivering the opinion, and three other judges concurring, that a child born in the United States, of Mongolian parents, residing at the time in the country, is a citizen, and entitled to enter the United States as such, irrespective of the restriction act. But this case was determined upon a mere question of fact, whether the petitioners *were born in the United States*. This question on the construction of the statute, as to a right to appeal on a mere question of fact, was not suggested, nor did it occur to me, under the broad language of the statute, before allowing the appeal. It may be, that the supreme court may feel justified in limiting the appeal to questions of law. I suggest the point without expressing a decided opinion, as to how it should be, ultimately, decided, but for the purposes of this case, rule against it. It is a point, at least, that the government, which has intervened, is entitled to have considered, and determined by the supreme court; and the public interests require, that it should be so determined. Should the appeal be thus limited,

Points decided.

[September,

it would obviate, to a great extent, if not, wholly, the great inconvenience now apprehended from the act.

The allowing of this appeal will enable the supreme court to, authoritatively, determine the point, at an early day, as the attorney general, at the opening of the next term of court, in October, can move to dismiss the appeal, on the ground, that an appeal does not lie under the act, upon a mere question of fact, the law applicable to the facts, assuming the petitioners to have been born in the United States, having been already settled in their favor.

I suggest this course, and on an intimation from the United States attorney, that this suggestion will be, promptly, acted upon, I shall suspend final action on any other application for an appeal, on questions of fact, till an opportunity is had to obtain a decision of the supreme court, on the point suggested.

It is expected, however, that prompt action will be taken.

DORA A. BUNT ET AL. v. SIERRA BUTTES GOLD MINING COMPANY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 2, 1885.

1. **NONSUIT IN NATIONAL COURTS.**—A nonsuit at the close of the plaintiff's case is never granted in the national courts. The proper practice in such courts, where the evidence for plaintiff fails to make a *prima facie* case, is, to instruct the jury to find a verdict for the defendant.
2. **PARTY ASSUMING RISK OF KNOWN DANGER.**—Where an employee in a mining tunnel knows that the roof of the tunnel at a given point is in an unsafe condition, and with such knowledge engages in the work of making it safe, voluntarily, sits down to rest himself under the dangerous point during a suspension of his work, and, while so seated, is killed by the falling of the roof upon him, the owners of the tunnel are not liable to an action for his death in favor of the surviving wife and children.
3. **INSUFFICIENT EVIDENCE.**—Where the evidence is such that the court would feel bound to set aside any verdict in favor of plaintiff, it is the duty of the court to direct a verdict for defendant.

Before SAWYER, Circuit Judge.

Mr. J. C. Black, for the plaintiffs.

1885.]

Opinion of the Court—Sawyer, C. J.

Mr. Harry I. Thornton and Mr. Eugene R. Garber, for the defendant.

SAWYER, Circuit Judge. At the conclusion of plaintiff's testimony in this case, on yesterday, the counsel for the defendant moved the court to instruct the jury to find a verdict for the defendant, on the testimony introduced by the plaintiff, on the ground, that, upon the case made by the plaintiff's evidence, all taken as true, the defendant is not liable; that, taking the evidence in its strongest light, against the defendant, the plaintiff presented no case upon which she is entitled to recover. In such cases, a motion of this kind is the proper practice in this court. The application is a substitute for a motion for nonsuit in the state courts. This court never grants a nonsuit—the proper motion being, to instruct the jury to find a verdict for the defendant. This case, like many others, of a somewhat similar character, that I have had occasion to try, is one, that, necessarily, excites sympathy in favor of the plaintiff. We are bound, however, to be governed by the rules of law, and the legal rights of the parties. On an examination of the authorities presented by the counsel last night, and in view of numerous others, that I have before had occasion to examine, I am satisfied that this is not a case in which the plaintiff is entitled to recover. All the numerous cases cited by plaintiff's counsel, have other features, that distinguish them from this case, and cases like it. Taking the evidence presented by the plaintiff, as all true, and viewing it in the light most favorable to her, it does not present a case, in which, under the law, she is entitled to recover.

In excavating the tunnel, the roof, according to all the testimony, was left solid, at first. It was, originally, a roof of solid rock, but subsequent blasts beyond, had somewhat shattered it. In October, and just before the accident, which caused the death of the plaintiff's husband, the superintendent of the mine was in the tunnel, and he saw that the roof looked somewhat shattered. He examined it, striking the roof at various points with a pick, and found that it might be dangerous. He thereupon, directed those working in the tunnel, of whom the deceased was one, to put in a

set of timbers to support the roof. There was one post only, there, but according to the testimony, which was not contradicted, it was not put there to support the roof; but placed in a narrow seam in the side of the tunnel, to prevent the light, soft vein matter from running into the tunnel from the side; and not for the purpose of supporting the roof. One of the two men in charge—there being two in equal authority, of whom the deceased was one—George Dubourdieu, asked the question, if it would not be better to remove that post, and put in the set, so that one of the posts of the set should stand in the same cut occupied by the post already there. The superintendent told him, that, if they thought they could do it with safety, they might do it in that way; but to satisfy themselves, that it would be safe, before moving the post; and if it would not be safe, to set one of the posts of the new set by the side of that post, a little beyond it. The deceased, with George Dubourdieu, and the others, had a conference on the subject, and considered the question whether they could remove the post, there standing, with safety, and they came to the conclusion, that they could. They acted on their own judgment. Both deceased, and George Dubourdieu, were experienced miners, who had been a long time, at work in this tunnel, and, were, doubtless, as well informed on the question, and as well qualified to judge of the safety of the act, as the superintendent himself. On examination, deceased assented to the conclusion with the others. They discussed the question, and concluded, that they could remove the post without danger; and put one of the set in its place. They proceeded to do that. The post was knocked out. The deceased assisted in moving it out of the way. He was just as well informed of the condition of that roof, and the dangers attending the work, as was the superintendent himself. He was consulted in regard to it—formed his own opinion as to the danger involved, and concluded that the removal could be made with safety. The men—and he was one of the shift bosses—acted, on their own judgment in the matter. It is manifest, that, they were parties, who were capable of judging of those matters. In proceeding to do that

1885.]

Opinion of the Court—Sawyer, C. J.

work, and knowing the danger, they, voluntarily, took the risk. I think this is a much stronger case for the ruling I make than *McGlynn v. Brodie*, 31 Cal. 376. In which the question arose on a motion for nonsuit, and, where all the authorities on the subject are fully discussed. That was a case in a state court, and the nonsuit was sustained by the supreme court of the state. This is a much stronger case for the ruling I make than that case. So in *Kielley v. The Belcher S. Mining Company*, 3 Sawy., 502, which was a case in Nevada, not clearer than this, I was compelled to rule in favor of the defendant. The deceased, in this case, was just as well informed as the defendant, or the superintendent, himself, was, and, voluntarily, with knowledge of the danger, assumed the risk of the work. It was not, therefore, the fault of the defendant. In this case, there was no defective machinery at all. It was the condition of the roof in the tunnel, produced, in part, by the act of the deceased, in blasting. If the accident could be regarded as the result of the carelessness of George Dubourdieu, the latter was a fellow servant, and there is no liability on that ground: *Buckley v. G. & C. S. M. Co.*, 8 Sawy., 395. But deceased had equal authority with George Dubourdieu, and, he himself, was consulted, and the negligence was as much his own, as of George Dubourdieu.

More than that, at the moment when the accident happened, the deceased was not, actually, engaged in doing anything relating to that matter. His duty at the time of the accident, did not require him to be in the position of danger at all. He had performed the duty of removing the post from the place, and put it out of the way, and he was at the time, not engaged in the performance of any duty connected with the work. Having a little leisure, while the other workmen were clearing out the place to put in the other timbers, he sat down to rest himself and, deliberately, sat directly under the shattered roof. Knowing its condition, he, voluntarily, selected that place for a seat upon which to rest himself. He was doing nothing at the time. There was, at that time, no occasion at all for him to sit, or be, at the point where the accident occurred. He assumed,

Opinion of Sawyer, C. J., concurring.

[August,

to the bonds and coupons sued on; that under the Montgomery avenue act it could not have been, legally, made an obligor on, or party to, the bonds issued in pursuance of the act; and that, in its corporate capacity, it has no relation to those bonds, and no duties to perform in connection therewith. The duties to be performed, whatever they may be, in connection with the bonds and coupons in suit, by parties who are also officers of the city and county of San Francisco, are in my judgment, to be performed by them under the provisions of the statute, as agencies or instrumentalities of the state, and not as agents or officers of the city. It follows, necessarily, that the city and county of San Francisco, in its corporate character, is, in no respect, chargeable with any liability, of any kind, upon the instruments sued on.

There being no liability of any kind, and no duty to perform by the municipality in its corporate capacity in relation to said instruments, no action, or judgment, can be rendered in the case that could avail anything as a foundation for proceeding by mandamus to compel the assessment and collection of a fund, for the payment of the coupons, and ultimate redemption of the obligations in question. For that, or any other purpose, looking to the collection of the money claimed to be due, the action might, just as properly, be brought against the city of Oakland as against the city and county of San Francisco.

The property holders of the district liable to be assessed, under the Montgomery avenue act, with respect to their lands, and the indebtedness in question, do not, under the act, stand, in any respect, in privity with the corporation—the city and county of San Francisco—and in relation to the instruments in suit, the municipality does not represent either the owners or the lands. Any judgment against the city, in this action, could not bind or conclude the owners or their property, neither being, in any sense, parties, or privies to parties, to the suit. The judgment, under such circumstances, could not afford any valid or legal foundation for proceedings by mandamus against the parties charged with the duty of assessing and collecting the Mont-

1885.]

Opinion of the Court—Sawyer, C. J.

gomery avenue bond tax; for, in that capacity, they are not officers, agents or instrumentalities of the municipal corporation; and they are not in privity with it. A mandamus, in the national courts, is in the nature of process, to execute a valid judgment; and it must be against the judgment debtor, or obligor, or some one representing the judgment debtor, or obligor. A proceeding, by mandamus, against the parties charged with assessing and collecting the tax in question, based upon a judgment in this case, would be very much like proceeding by an execution against B, to satisfy a judgment against A, between whom there is no legal relation whatever, affected by, or affecting, the judgment.

If the views expressed are sound, the complaint presents no cause of action against defendant, and the facts alleged, and offered to be proved, are wholly immaterial.

It would be but a waste of time to occupy the attention of the court in taking testimony which cannot prove, or tend to prove, any valid cause of action. The complaint is wholly insufficient, and the pleadings present no material issue. For the reasons stated in this opinion, and in the opinion of the presiding justice, in which I concur, the objection to the introduction of the evidence offered must be sustained.

IN RE SUN HUNG AND SI YEE.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 24, 1875.

1. **APPEALS—HABEAS CORPUS.**—Under section 764 R. S., amended by the act of March 3, 1885, (Session Laws, 1885, 437) the right of appeal in *habeas corpus* cases is absolute, and not dependent upon the discretion of the judge, to allow, or deny, an appeal.
2. **CHINESE RESTRICTION ACT.**—Policy of allowing appeals on questions of fact, arising under the Chinese restriction act, discussed, and limitations on the right of appeal suggested.

Before SAWYER, Circuit Judge.

Mr. J. C. B. Hebbard, for the petitioner.

SAWYER, Circuit Judge. This is an application for the allowance of an appeal to the supreme court, under the

recent act of congress giving an appeal in these cases. The case was brought to this court by appeal from the district court, and the appeal is on a question of fact, whether these two parties were born in the United States. The testimony is, extremely, slender, and uncorroborated, and the judgment in the district court, was, therefore, affirmed.

The act is very general, and comprehensive, in its provisions, and I was in doubt, whether the right of appeal is absolute, or whether I have any discretion to refuse to allow the appeal. Had I the discretion, I, certainly, should deny an appeal in this case. I think it is a case with which the supreme court should not be troubled. I do not think there is enough in it, to justify taking it up. There is no question of law involved. If there is no discretion in these cases, every case of *habeas corpus*, of this character, whichever way decided, can go to the supreme court on appeal. Upon examination, I have come to the conclusion, that I have no discretion in the matter, and that, the right of appeal is absolute. I think the act must have passed without due consideration, without appreciating the effect or the consequences of an unlimited right of appeal. There should, in my opinion, be an appeal in some cases. A petitioner ought not, always, to be compelled to wait until the judges disagree. Very important questions arise under the Chinese restriction acts; which the judges, themselves, are not clear upon, in which there ought to be a decision of the supreme court of the United States, and in which the judges, earnestly, desire such a decision. These acts involve international considerations and international questions of the highest importance, but in my judgment, there should be some limit to the right of appeal, in these matters. Perhaps the right ought not to rest upon the discretion of the judges, who have tried the cases, because, it would be a delicate matter for them, in some cases, to deny an appeal from their own judgments. Certainly, in addition to an appeal, where there is an opposition of opinion in this class of cases, wherever a judge finds a question of law, upon which he is not clear, he alone, in my judgment, should be entitled to certify that question up, for final decision of the

1885.]

Opinion of the Court—Sawyer, C. J.

supreme court, where the matters are of such importance as are often involved in the construction of the Chinese restriction acts. There have been several questions raised before, and decided by me, which I should have been very glad to certify up, and should have certified up, for an authoritative decision of that tribunal, had I been authorized to do so.

I think there should be no appeal on a mere question of fact, unless there is additional testimony to be taken before the supreme court. In this class of cases the judge who hears the evidence, and sees the witnesses, is, certainly, in a much better situation to determine a question of fact than the supreme court could be, on the written record of what occurs before the court of original jurisdiction. On the question of fact, it seems to me, there ought not to be an appeal. However, congress may think otherwise. I merely make the suggestion on the question of policy. On an important question of law affecting the rights, and liberty of parties under the constitution, and laws of the United States, on which, any judge entertains a reasonable doubt, and which he thinks should be determined by the supreme court, there, certainly, should be an appeal. Where the judge has decided the case, and feels confident of the correctness of his decision, there should be some such limitation as this: The party appealing, should be required to present a copy of the record, and an assignment of alleged errors, to one of the justices of the supreme court, for his examination, to see whether the appeal is frivolous, or whether there is really anything in it, that justifies the allowance of an appeal; and such justice should have some discretion in the matter of allowing an appeal.

There, certainly, could be no objection to entrusting that discretion to a justice of the supreme court, whatever objection there might be, to entrusting such power to the court, that heard the case. Such a rule is prescribed by the recent act authorizing writs of error in certain criminal cases, to remove them from the district court to the circuit court. In such a case, the party, who desires the writ of error, is compelled to prepare a copy of the record, and lay

the performance of the engine, and falsely, and in bad faith, reported against it, in obedience to general popular clamor, in order not to injure his business or his own popularity among his neighbors.

I am disposed to think, that if such were clearly shown to be the state of facts, the court would be justified in disregarding the official report, as having been made in bad faith, and in fraud of the rights of the other contracting party, and in adopting Noonan's own real conviction upon the subject. But I cannot say that the state of facts claimed is so satisfactorily shown as to justify me in holding the performance of the engine to be, in fact, satisfactory to Mr. Noonan, in the face of his official report and his positive testimony to the contrary. There is, undoubtedly, testimony tending strongly to support the hypothesis insisted on by plaintiff, and circumstances tending to throw strong suspicion upon the acts in question. Mr. Silsby testifies that, on the evening of the test, Mr. Noonan "expressed himself as being perfectly satisfied with the engine." He says: "The next day after the trial, at his store, in Chico, Alderman J. C. Noonan said to me, 'Mr. Silsby, I am perfectly satisfied with the engine. There is a great deal of feeling here over the matter, and I am afraid it will injure me in my business. They are bringing strong pressure on me to vote against the acceptance of the engine, and if I do so, I shall brand myself a coward, because the engine is all you claim for it.'"

Mr. Burke testifies that Noonan told him, in answer to a question, as to how he liked the engine, "that it did all, and more than was required of it,—that is my recollection," but that he could "not purchase the steamer," because "public opinion was so great;" that "public opinion was too strong against it," and "I will vote against it and I will vote myself a coward in doing so." Mr. Sproul testified, that in a conversation with Noonan, in regard to the merits, and demerits, of the machine, in the month of April, after the arrival of the engine, but he could not tell, "whether it was after this test or not," in which he referred to public opinion against the engine, and in that connection said, "so far as I can see, the engine fulfills all the qualifications."

1885.]

Opinion of the Court—Sawyer, C. J.

Mr. Noonan, positively, denies having any conversations of such character, as stated by the witnesses; denies that he ever stated to either of them, that he was satisfied with the engine or that he should vote to reject it in consequence of public opinion. He admits having a conversation with Mr. Silsby upon the subject, but not of the purport stated by Mr. Silsby. The following, said he, is "just exactly the shape I put that in; I said, that I did not care to prejudice myself as against public opinion; that it would not be fair for me to condemn his engine, because of public opinion; *that it would be condemned for other causes; that I did not think the engine came up to the requirements of the contract.*"

He states, that he expressed his dissatisfaction to Silsby, and the particular points, among them, were, "as I understood the contract, and was disposed to interpret it, we were to have a body of water on the house on fire, in four to six minutes. That this was needed in a town built of wood like Chico, where there are very dry summers. Inasmuch as she did not produce such a stream, I thought it was wrong; I thought she should do that." And there was testimony that there were other engines that would do that. In another place, he says, a stream of water could not be got on a house in less than thirteen minutes. He said Silsby appealed to his sympathy, and said he would rather give a thousand dollars, than to have the engine rejected, it would do him so much injury. He says, that he did sympathize with Silsby, and was desirous, that the engine should stand the trial.

Under the contract, the engine was "warranted to raise steam from cold water in *from four to six minutes*, and to generate and maintain an ample working pressure of steam for effective fire purposes." Noonan claims to have been dissatisfied on both these points. There is room for discussion as to what is meant by the phrase, "raise steam from cold water in from four to six minutes." Testimony of witnesses was taken upon the point, and different witnesses understood the phrase differently. Mr. Noonan appeared to be a candid and intelligent witness, and there is nothing to throw suspicion on his truthfulness except the testimony

as to his statements different from those made, as a witness on the stand. He appears to be a somewhat prominent business man of Chico, and to hold one of the most important city offices.

No two witnesses seem to have heard the same conversation. Loose conversations, heard and considered from different stand-points, are liable to be misunderstood, or misinterpreted, as well as misremembered, after the lapse of considerable time. Noonan, certainly, ought to know, what he intended to say. If he intended to disregard his own convictions, and do an act which he acknowledged, at the time, to be both wrong and cowardly, it seems, highly improbable, if not impossible, that he would boldly declare his base and cowardly purpose, to the man he was about to injure by such action. I cannot help thinking, that, there must have been some misapprehension, as to what he did say, or intended to say, or some misrecollection of his language. At all events, in the face of his formal official report, and action, and his positive testimony on the stand as to what he intended to say, and what he did, in fact, say, the testimony in regard to loose conversations on the occasions referred to, by the other witnesses, whose views and sympathies were with the other side, and who viewed the matter from a different standpoint, is, scarcely, sufficient to brand Mr. Noonan with acting in bad faith, and perpetrating a deliberate fraud upon complainant by reporting himself as not being satisfied, when, in fact, he was satisfied, or to convict him of deliberate perjury in support of his action. The burden of showing by preponderating evidence, that he did this act, in bad faith, and in fraud of the plaintiff's rights, is on the plaintiff.

There were other witnesses who did not think the engine came up to the specifications, in its performance. Although it is not without some hesitation, I am disposed to think, upon the whole, that the committee ought to have been satisfied, and accepted it. Yet, it must be confessed, I think, that there might well be an honest difference of opinion upon the subject. I cannot, therefore, find, upon the evidence, that Noonan was, in fact, satisfied with the perform-

1885.]

Opinion of the Court—Sawyer, C. J.

ance of the engine, or satisfied that it came fully up to the guaranty in its performance. The first trial was conceded to be a failure, and was stated by some witnesses to be a lamentable one.

In order to make the final test a success, it was necessary to send to the neighboring city of Marysville, both for the quickest coal for fuel, that could be had, and for an engineer of long experience with this kind of engine, to manage it. Some of the witnesses said, it took three men to fire her during the trial, one to break the coal into small pieces, and two to supply the engine. Some witnesses on the other side, said the door was open a considerable portion of the time; others did not see the door open except when necessary to put in coal, although in a position to see such occurrences. Undoubtedly, it required the most favorable conditions, and most earnest and persistent efforts, to make the test a success; and from the testimony, it may well be doubted, whether in actual practice at fires the performance would come fully up to the requirements of the guaranty. Under all the circumstances, however, I am inclined, upon the whole, though with considerable hesitation, to think that the committee ought to have been satisfied, yet upon all the evidence, I cannot say that it has been, satisfactorily, proved by a preponderance of evidence, that Noonan was, in fact, satisfied, and, notwithstanding his convictions, in bad faith, fraudulently, reported that he was not satisfied. I must, therefore, reject the hypothesis sought to be maintained on this point, and relied on by plaintiff.

There is no claim that the other member of the committee, who acted with Noonan, did not act in strict accordance with his convictions.

As the engine was to be furnished "*subject to the approval of the fire committee*," and its "*performance*" "*warranted*" to be "*satisfactory to them*," or "*to be removed without expense to the town*," and it was *not* approved by them, and its performance *was not satisfactory* to them, there can be no recovery on the contract.

It is clear to my mind, from the evidence, that there was no acceptance of the engine on the part of the town of

Chico, and no act of the defendant, or its officers, by which it is estopped from denying the liability of the defendant on the contract, or otherwise.

As there is no appeal, I have considered the case with great care, in order to reach a correct conclusion, and I am constrained to say, that in my judgment, the plaintiff is not entitled to recover; and that judgment must be rendered for defendant. Let a general finding be drawn in favor of defendant, and judgment be rendered accordingly.

FISHER ET AL. v. CONSOLIDATED AMADOR MINE, ETC.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 7, 1885.

1. PATENTS FOR INVENTIONS—PRIOR RECOVERY.—In an action at law, by a patentee, to recover damages for the use of a patented article, an answer which sets up that the article used was purchased by defendant from a manufacturer, against whom the patentee had brought a suit in equity, and obtained a decree for an accounting, in which accounting and decree the article in question was included, does not state a defense, unless there is a further allegation that the decree against the manufacturer has been satisfied by payment or otherwise.

Before SAWYER, Circuit Judge.

DEMURRER to a special answer.

Messrs. Langhorne & Miller and Mr. W. H. H. Hart, for plaintiff.

Mr. J. A. McKenna, for defendant.

SAWYER, Circuit Judge. This is a demurrer to a special answer. The action is brought to recover damages for the unlawful use of certain hydraulic machines, which are alleged to infringe upon reissued letters patent number eight thousand eight hundred and seventy-six, owned by plaintiffs. The answer sets up that the same plaintiffs had, previously, brought suit in equity against one Hoskins, to recover the profits resulting from an infringement of the patent by Hoskins, in manufacturing and selling machines constructed according to the specifications of the patent;

1885.

Points decided.

that a decree had been rendered in that case in favor of plaintiffs, and against Hoskins, and upon an accounting had, the sum of sixteen thousand four hundred and sixty-five dollars and thirty-three cents had been awarded to plaintiffs as the profits realized by Hoskins from manufacturing and selling said machines. The answer further alleges that the particular machines used by the defendant, and for the use of which the present action is brought, were purchased by defendant from Hoskins, and that the profits of their manufacture and sale had been included in the decree against Hoskins, and that therefore the plaintiffs had received satisfaction for the said machines, and defendant was not liable to plaintiffs for using the same.

But the answer nowhere alleges that the Hoskins decree has ever been satisfied by payment or otherwise. In order to be a defense, it must allege that said decree has been paid or otherwise satisfied, as well as that the accounting against Hoskins included the machines in question. In the absence of such allegation, the answer does not state a defense. (*Gilbert & Barker Mf. Co. v. Bussing*, 1 Bann. & Ard, 621; *Birdsell v. Shaliol*, 112 U. S. 485; *Steam Stone Cutter Co. v. Sheldons*, 21 Fed. Rep. 875; Walker on Patents, sec. 314.)

It follows, therefore, that the demurrer must be sustained, and it is so ordered.

If the defendant desires, it can have time to amend, though I cannot see that it can properly amend, unless it can truthfully state that the decree has been satisfied, and I have good reason to know that it has not been satisfied.

EX PARTE RICHARD KOEHLER, RECEIVER OF THE O. & C.
RAILWAY.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 8, 1885.

1. **DISCRIMINATION BY RAILWAY CORPORATION.**—Notwithstanding the Houlst act, a railway corporation may charge less for a long haul than a short one in the same direction, when the rate for the long haul is made necessary

by other lines of transportation competing for business at the point from whence the long haul is made; and where the road of such corporation forms a part of a line of transportation, consisting partly of water carriage, between two principal points, the rate may be made so as to enable it to compete with another road that constitutes a part of another line of water and railway transportation between the same points.

2. **PROVISO TO SECTION 2 OF THE HOULT ACT.**—Under this proviso, which excepts from the operation of the act “goods intended in good faith to be shipped to points beyond the limits of the state,” wheat intended by the shipper to be sent directly to San Francisco, or other points beyond the limits of the state, via Portland, may be carried on the O. & C. road from Corvallis to the latter place without reference to said act.

Before **DEADY**, District Judge.

PETITION for instructions.

Mr. John W. Whalley for the petitioner.

Mr. Wallis Nash for the Oregon Pacific Railway Company.

DEADY, J. By section 4 of the act of February 20, 1885, it is declared unlawful for any person engaged in the transportation of property by railway in this state to charge or receive any greater compensation for a short haul than a longer one in the same direction. (Ses. L. 39.)

On April 23, Mr. Koehler, the receiver of the road of the Oregon & California Railway Company, presented a petition to this court, asking for instructions concerning his right and duty, as such receiver, under the provisions of said act, whereupon said receiver was instructed, among other things, as follows: “To charge no more for the transportation of goods than the maximum allowed by the act, nor no more for a short haul than a long one in the same direction, except to and from points where the rate obtainable is affected by water transportation, in which case he may carry at as low a rate as the water craft do, without reference to the length of the haul.” (6 W. C. Rep. 345).

And now said receiver asks for further instructions under said section 4 on a state of facts which have arisen since that date. From the present petition it appears that the Oregon Pacific Railway Company has lately completed a road from Yaquina bay to Corvallis, and is now engaged in the transportation of freight and passengers thereon between said

1885.]

Opinion of the Court—Deady, J.

points; that in connection therewith an ocean steamer is run between Yaquina bay and San Francisco, "thus forming a line of transportation from Corvallis, in the center of the Wallamet valley, to San Francisco," making Corvallis a competing point for railway and ocean transportation of goods exported from or imported into the state; and that this fact necessarily affects the rate of transportation obtainable at other points capable of being reached by water craft from Corvallis.

By leave of the court, the counsel for the Oregon Pacific was heard on the petition in opposition to counsel for the receiver.

It does not appear, as distinctly from the petition as it should, but it was admitted on the argument by counsel, that the Oregon Pacific is carrying wheat from Corvallis to Yaquina bay, a distance of seventy-two miles, for two dollars and sixty cents per ton, from whence it is carried by steamer to San Francisco for one dollar and ninety cents per ton, or four dollars and fifty cents over the whole route; while the receiver is carrying it on the road of the Oregon & California Company, from Corvallis to Portland, a distance of ninety-eight miles, for three dollars and twenty cents a ton, from whence it is carried by steamer to San Francisco for two dollars and fifty cents per ton, or five dollars and seventy cents over the whole route. From this, it appears, that there is in fact a competition between these two roads, at Corvallis, for the transportation of Oregon wheat, destined to San Francisco—the one being an important part of the route via Yaquina bay, and the other via the Columbia river.

The ocean and railway transportation via Yaquina bay appear to be under one management, and are probably one in interest. The water transportation via the Columbia river route is merely a connecting link with the Oregon & California road, and the management and ownership of each is separate and distinct from that of the other.

It follows that the managers of the Yaquina bay route, by making a rate to San Francisco, less than the one by the Columbia river, whether the reduction be on the railway or

ocean part of such route, or both, may prevent the Oregon & California road from carrying any wheat from Corvallis, that is destined to San Francisco, unless the latter is allowed to compete for the same by making a rate between Corvallis and Portland, which will at least equalize the cost of transportation by the two routes.

Of course, the Oregon Pacific has no right to object to this, and the public who are interested in or dependent upon Corvallis as a shipping point for the export of wheat, cannot be injured by it, but may be benefited.

The only objection that can be made to this reduction of rate from Corvallis to Portland is that it would be in conflict with the provision of the "Hoult act," concerning short and long hauls, unless the rate is correspondingly reduced at all points between these two places, which is not intended.

In *ex parte Koehler*, *supra*, I held that while the state had "the power to prevent a railway from discriminating between persons and places for the sake of putting one up and another down, or for any reason other than the real exigencies of its business," it could not prevent discrimination between places, when it is the "result of competition with other lines or means of transportation," and practically thereby deprive a railway company of the right to do business and render its property comparatively valueless.

This ruling governs this case. The Oregon Pacific, by means of its connection with the ocean steamer between Yaquina and San Francisco, is competing at Corvallis with the Oregon & California road for the carrying of wheat to San Francisco, and the receiver of the latter must be allowed to make a rate between Corvallis and Portland that will enable it to secure what it can of the business.

The receiver also asks for instructions under the proviso of section 2 of the act, which reads as follows: "The provisions of this act shall not apply to goods intended in good faith to be shipped to points beyond the limits of this state."

At the passage of this act there was no railway running out of the state, except that of the O. R. & N. Company. And such is still the case. The only reason on which the

1885.

Points decided.

proviso could have been adopted, is, that in the carriage of goods out of and beyond the state, no injury or inconvenience can result to places within it, by reason of a less rate for a long haul than a short one in the same direction. Besides the transportation of goods to a point without the state is interstate commerce, and beyond the power of the state to regulate. And it can make no difference in principle or result that the goods so shipped are carried over different lines of transportation within the state before passing beyond its limits. It is the intent or purpose of the shipper concerning the destination of the goods at the time of shipment that determines the question whether they are within the exception or not. Whether the road upon which they are first placed is an interstate one or not is immaterial. Any road which leads beyond the limits of the state or forms a link in a line, of interstate transportation, upon which goods are shipped with intent to transport them beyond the limits of the state, is so far exempt by the proviso from the operation of the act. (*Pacific Coast S. S. Co. v. R. R. Commissioners*, 9 Sawy. 253; *Daniel v. Ball*, 10 Wall. 557).

The question in each case is one of fact, and must be determined by its own circumstances.

The receiver is therefore instructed that in hauling wheat or other property from Corvallis or other points on his road that is *en route* for San Francisco or other point beyond the limits of the state, he may make a rate therefor without reference to the act.

THE QUEEN OF THE PACIFIC, HER CARGO, ETC.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 9, 1885.

1. SALVAGE—AMOUNT OF AWARD—HOW ESTIMATED.—The elements which enter into the estimate in fixing the amount of compensation for a salvage service are: (1) The value of the property saved and of that employed in saving it; (2) the degree of peril from which the saved property is delivered; (3) the risk to which the property and persons of the salvors are exposed; (4) the severity and duration of the labor; (5) the prompt-

Opinion of the Court—Sawyer, C. J.

[October.]

ness with which the services are interposed; and (6) the skill, courage, and judgment involved in the services.

2. **SAME—DECREE OF DISTRICT COURT AFFIRMED.**—As in this case all of the elements which go to justify the largest allowance are found, except that the duration of the labor was not long, and the risk to the salvors and their property, though very considerable, was not of a very extreme character, the decree of the district court awarding sixty-four thousand seven hundred dollars, or about ten per cent. of the value of the property saved, is affirmed, with interest upon the amount of the award from the date of the decree of the district court at the rate of six per cent.

Before SAWYER, Circuit Judge.

IN admiralty. The opinion of the district court is reported in 21 Fed. Rep. 459, and 10 Sawy. 304.

Mr. Milton Andros, for claimant.

Mr. M. W. Fechheimer, for libelants.

Mr. C. E. S. Wood, for intervenors, Gray and others.

SAWYER, Circuit Judge. At the last moment the able advocate for the claimant filed a voluminous and exhaustive printed argument, in which the evidence in the entire case is examined with great analytical and critical ability. This was not, as I have been informed, furnished to either the advocate for the libelants, or the advocate for the intervenors. I should have given the opposing advocates in the case an opportunity to be further heard on the questions discussed if I had thought it necessary to a proper determination of any of the points raised in the argument. I have myself fully examined every question discussed, and I cannot but feel impressed with the care and labor bestowed upon the case, and with the fact that nothing has been omitted that legal ability and searching analysis could present. I have examined the maps and exhibits, and the testimony in the case, going over much of it several times, and I have arrived at satisfactory conclusions as to every disputed point, which I will now proceed to announce. In giving my decision, I shall follow the order laid down in the argument just referred to, which in turn has followed the order of the findings of fact in the decree made by the district judge.

“*First*—That the services performed by the libelants and intervenors to the Queen of the Pacific, her tackle, apparel,

1885.]

Opinion of the Court—Sawyer, C. J.

furniture, appurtenances, and cargo, on the fourth and fifth days of September, 1883, were salvage services."

This finding is admitted.

"*Second*—The diameter of the wheel of the Queen of the Pacific is sixteen feet, the hub of her propeller is three feet in diameter, and the center of the hub is nine feet above the keel line."

This finding is admitted.

"*Third*—At low water the hub of the propeller, when not covered by the swell, was clearly visible, and there was not more than eight feet of water under the stern of the stranded vessel at low tide when she was aground."

This is the first finding challenged. I shall not go into the evidence upon this head. I have carefully examined it, and I am satisfied that the finding is fully sustained by it. To Captain Harris' testimony bearing upon this point I attach considerable weight. He is a man of experience, master of the government life-saving station at Cape Disappointment, totally disinterested, and he had good opportunities to observe the condition of things at the time. I think the finding is fully borne out by the testimony, and I affirm it.

"*Fourth*—That the vessel and her cargo were in imminent peril of destruction at the time the services were rendered, and that said vessel and her cargo would probably never have been saved without the aid furnished by libelants and intervenors."

This finding is also challenged, and is examined in the claimant's brief under the following heads:

"(1) Whether the vessel was in *imminent* peril of destruction at the time the services were rendered; (2) whether it be probable that the ship and her cargo would never have been saved but for the aid furnished (a) by the libelants, (b) by the intervenors; (3) if it be probable that without the aid of the libelants and intervenors the ship would have been lost, then the degree of such probability."

This is, perhaps, the most important finding in the case, and the amount of property at stake is so large, reaching about three-quarters of a million of dollars, it must be one of the main controlling elements in fixing the amount of the award, and I have consequently given to the point what I believe to be careful and conscientious consideration. The word "imminent," it is insisted, conveys usually some idea of "immediate"—of something to happen "upon the instant." But concede this to be so, in a general sense, yet it does not mean an instant consummation. There was peril all the time. A storm was liable to rise at any moment; and there was in fact a high wind and rough sea on the day after the rescue. That the Queen was in a position of extreme peril is admitted. That, if she had not been rescued at the time she was, in all probability she never would have been is also admitted. But we do not need these admissions. We know from the history of those sands, and the wrecks upon them, from the natural laws that govern the ocean, and from all the testimony in the case, that the situation was one of the greatest menace, calling for prompt action and constant attention, and that anything like a storm at any time would have inevitably destroyed the ship. Indeed, it might well be said that the destruction would have been inevitable had she not been got off at the time she was. Immediate, prompt, continuous, energetic action was required to save her. Therefore, I think it can be said with entire truth that the danger was "imminent" during the entire time she was on the sand. In the opinion of all the witnesses familiar with Clatsop spit, her position was one of imminent danger. Captain Flavel's son said that he did not think she could be saved. I am also inclined to attach considerable weight to the testimony of Captain Barry, who has been a resident for some years at Astoria, and who was then acting as the agent for the Lloyds, and whose opinion was "that unless there was a series of very fortunate circumstances and good management the Queen would not come off." All seemed to entertain similar views.

As to whether the ship would probably have been lost but for the efforts of the salvors, it is in evidence and ad-

1885.]

Opinion of the Court—Sawyer, C. J.

mitted that immediately after the steamship grounded the engines were reversed, and kept backing with full force for several hours without avail, and that she went on and came off at about the same stage of the tide is likewise admitted. All that the steamship had acquired before the libelants took hold of her, in addition to her propeller, was the anchor sent out during the night by means furnished by the intervenor Gray. Meanwhile, she had lain over twenty-four hours on the sands, and it had bedded about her, burying her propeller-blades so deeply that the engineer found great difficulty in working them past the center. To the cable attached to the anchor, which anchor was very soon deeply bedded, and never came home at all, was applied a fourfold purchase, which would multiply the power of the capstan engine four times, less friction and stiffness of cordage. I have no doubt this anchor held the ship from going further on the sands. Again, at the high tide, after midnight, with the capstan worked by an engine of fifty horse-power, with the fourfold purchase mentioned, and the main engines in full play for several hours, the tide being at its height, the ship failed to come off, or even to move. There is evidence tending to show that she moved a little; but I do not trust that evidence—it does not satisfy my mind. It was certainly very difficult to determine, by the means employed, that the ship had moved the short distance of nine feet, as testified to by third officer Wheeler, the only officer who speaks with any degree of positiveness, but to whose evidence I do not attach much importance; for he at one time testified that she moved five hundred and forty inches, which wholly uncorroborated statement he, upon the following day, corrected and limited to one hundred and eight inches. Captain Alexander, who of all on the ship, ought to have known, is very careful not to say that she moved; he will only say, "It was the general impression that she moved that night." Captain Harris, of the life-saving station, a disinterested witness, and one upon whose testimony I feel disposed to rely, says that he tied a rope yarn about the hawser, and it carried through the hawse-pipe about nine feet; but this, he said, would only indicate that the

ship moved, or the anchor came home, or the hawser stretched. In another place Captain Harris states positively that he does not think the ship moved; and, on carefully examining his testimony, I have concluded this to be his real opinion, and what he meant to indicate about the piece of twine was that the new hawser had stretched about nine feet. But, suppose she had moved, if she stopped after having moved, the stoppage must have been occasioned by some resistance greater than she had been overcoming; and to stop a ship of her size, when once in motion, with considerable momentum acquired, no trifling sand-bank would suffice; so that we might truly say the last condition of this ship was worse than the first. My own conclusion is that the ship did not move at all.

Again, it is said in behalf of the theory that the Queen accomplished her own relief, that Captain Alexander called out to the engineer to give her all the steam she would stand, to "throw the throttle wide open," or something of that kind, and then she came off. Now, according to the engineer's testimony, the whole machinery of the vessel had been working up to its full capacity for half an hour before she came off, so that, whatever Captain Alexander may have intended, it is evident his words had no effect. He doubtless gave the order as the vessel rolled back and forth, and he saw she was loosened in her bed; but the critical moment had passed, and the work had been accomplished. I think it is clear from the evidence that after the four tugs of Captain Flavel swung around to their second position (the main and capstan engines being in full play), there was a "long pull, a strong pull, and a pull altogether," which had the happy result of releasing the ship. Whether any of these forces, and, if any, just which ones, could have been dispensed with is a matter that cannot be known; but, in my opinion, they were all necessary, and all contributed largely to release the ship, and I have no doubt at all that the vessel would never have been gotten off if it had not been for the efforts of the salvors, libelants and intervenors. I do not think the services of either the libelants or the tugs, or of the intervenors could have been dispensed with without a loss of the vessel. It

1885.]

Opinion of the Court—Sawyer, C. J.

was, as I say, a united effort, at the right moment, after the vessel had been loosened and rolled over in her bed by the action of the libelants, that released the ship. I think this finding of the district judge is couched in very moderate language. To me it seems he would have been justified in using the stronger terms, perhaps, that but for the salvors her loss would have been inevitable. We know these facts: that after she went on she worked her engines to their utmost capacity for some hours without any effect; that again, at the next tide, she, together with the capstan engine, working at the capstan connected with the anchor, worked them all for two hours at their full capacity without effect; and again, at the following tide, after working all her engines for two hours, and for the last half hour at their full capacity, with the aid of Captain Flavel's four tugs, and after the tide-rip had twenty-four hours to bank her up, she did in fact come off at a tide several inches lower than when she went on. What would have happened in the absence of any one of these aids we can only conjecture. It is true that a considerable cargo had been jettisoned, but the ship was buried still deeper in the sand in the meantime. I think it safe to conclude that she never would have been got off with any appreciable less aid than was afforded. I do not think it necessary to occupy more time in reviewing the evidence and presenting my reasons further upon this head. The finding of the district court is affirmed.

One other point I deem it proper to notice in this connection; that is, that in order to depreciate the services of Captain Flavel and his tugs, the claimant finds it necessary to give full credit to the efficiency of this anchor, carried out by the means furnished by Gray, the scow, and the tug Canby; and, in seeking to deprive Gray of his share of the reward as a salvor, the advocate for the claimant suggests means by which the ship, without the aid afforded, could have accomplished the same purpose, but none of these means are shown by the evidence to have been used, or even otherwise suggested, and what might have been done is wholly conjectural. All that is certain is that Captain Gray, either from experience in such matters, or by a happy in-

spiration of the moment, grasped the fact that the Queen had no means for carrying out her heavy anchors, and that his scow would afford a ready and certain way of approaching her, and suitable means for accomplishing this object; that he acted promptly upon the thought, brought his scow from Astoria, and that the means thus provided by him were used with great benefit to the ship; and that until the arrival of the scow the planting of an anchor had not even been discussed or suggested, so far as we know; that Captain Gray remained by the distressed steamship until his services were no longer needed, and in the dark with his tug and scow assisted in carrying out this anchor—all of which shows that he is largely, if not solely, entitled to the credit of whatever benefit this anchor was to the ship.

“*Fifth*—That the vessel went on and came off the spit where she was aground at high water ‘slack.’”

This finding is not challenged.

“*Sixth*—That on the fourth of September, 1883, it was high water at the point where the vessel was aground at about 1:41 o'clock in the afternoon, and on the fifth of September, 1883, it was high water at the same point at about 2:07 in the afternoon.”

This finding is not challenged.

“*Seventh*—That the main engines of the vessel are three thousand horse-power, and she has also a smaller engine of fifty horse-power; that the highest capacity to which the main engines were ever worked during the time she was stranded was about two thousand two hundred horse-power; and that as soon as the vessel grounded her engines were reversed and worked to their full capacity attempting to back her off, but without success; and that on the night of the 4th, at high tide, both her main and her smaller engines were worked to their full capacity for about two hours in attempting to get the vessel off, but without success.”

This finding is not challenged.

“*Eighth*—That the engines of the stranded vessel had

1885.]

Opinion of the Court—Sawyer, C. J.

been working to their full capacity for about half an hour immediately prior to the time when the vessel came off the spit."

This finding is admitted.

"*Ninth*—That the weather during the time the vessel was stranded was thick with fog and smoke, and the sea was comparatively smooth, with a swell thereon of about six feet."

This finding is challenged, but there is no contest upon it except as to the height of the swell, and I think the majority and weight of evidence sustains the finding. It is affirmed.

"*Tenth*—That on the night of the fourth of September, 1883, and at low tide, there were light breakers or tide-rips in the vicinity of the place where the vessel was aground."

This finding is challenged, but was, as I remember it, abandoned on the trial. Certainly there is no conflict as to this point in the evidence, and the finding is affirmed.

"*Eleventh*—That on the day following the rescue of the vessel the weather and surf on the spit were such as would have made it very dangerous for the vessel if she had been there."

This finding is challenged, but exactly why I cannot understand, for the next finding, which is admitted, contains a corroboration of it. However, it is my opinion, fully sustained by the evidence, and is affirmed.

"*Twelfth*—That if the vessel had not been rescued when she was, in all probability she never would have been saved."

This finding is not challenged, and it obviates any necessity for the three preceding findings.

"*Thirteenth*—That the libelants and intervenors displayed promptitude, energy, skill and good judgment throughout in the performance of the services rendered to the property libeled in this suit, and that the safety of such

Opinion of the Court—Sawyer, C. J.

[October,

property was largely due to the efforts of the libelants and intervenors in that behalf."

This finding is challenged, but is discussed in claimants' brief in the third subdivision of the elements of salvage, and under the fourth finding of the decree. I do not think it necessary to add anything to what I have already said, further than to remark that I think it highly probable, if not certain, that a man of the large experience of Captain Flavel (over twenty-five years at the mouth of the Columbia river, and engaged in the steam tug business for towing and aiding vessels), would know more about the business in hand than any other person present. At all events, he was left to his own devices and discretion, and at no time was he interfered with or a suggestion made to him by those on the Queen. This shows the confidence reposed in Captain Flavel's judgment, experience and discretion by the officers and agents of the Queen. Some fault has been found with him for hauling with the tugs on the port quarter of the Queen of the Pacific, and with his theory of "wiggling" her in her bed, and the opinion has been expressed by some of claimants' witnesses that he ought to have pulled dead astern, so as to drag her off in the way she went on. In the first place, she was a very large and heavy ship, and must have gone on to the bank or spit under full headway, for she was found wholly inside the twelve-foot depth of water line, and a long way inside the line of breakers, and no efforts of her own gave her any relief. It is evident that loose, shifting sands, of the character these are shown to be, would bank about her mid-ships, and it is in evidence that she had a considerable bank on her starboard side, and it is more than probable there was one on her port side also. These banks had accumulated under the operation of the "tide-rips" during the twenty-four hours and over that the Queen of the Pacific was on the spit, and it is evident that to have dragged her through them, she being wider amid-ships than aft, would have been, in the nature of things, very difficult if not impossible. It does not need evidence to show, on the other hand, that if she could be moved ever so little in her bed it would loosen the sand about her and allow the

1885.]

Opinion of the Court—Sawyer, C. J.

water to rush in and help clear it away. Besides, these banks of sand closely impacked about the sides of a ship would, not only by friction and pressure hold the ship in her bed, but exclude the water and its pressure, and thus diminish largely the area of the lifting surface for the water to act upon, and the buoyant effect would be lost of a large portion of the water about her, so that it would require a greater depth to float her than if the sand were not packed about her sides. By pulling on the quarter, and endeavoring to turn the ship in her bed about her midlines, it is evident a greater force could be exerted to break up this bed of sand. Moreover, these cables, one fastened to her starboard and one to her port quarter, were attached to the ship twenty or twenty-five feet above her keel, thus giving this leverage to the tugs to enable them to roll her upon her keel. For example, we all know that by fastening the cables on the masts a little above the decks, and using the leverage afforded, ships are often hove down to scrape or repair their bottoms. That this proceeding produced its proper effect is evident from the fact that when the tugs had pulled for awhile the ship righted and surged over to port, but when they relaxed, and fell around more to stern, at the time they were getting into position to pull her off, she again rolled back to starboard, (thus rolling back and forth in her bed,) a conclusive proof, to my mind, that she had broken her bed of sand, but was still resting her keel upon the bottom, and was far from being afloat. Much stress is laid upon the anchor laid by the Queen by the aid of Captain Gray, and which was attached to a cable having a fourfold purchase rigged upon it, and operated by the steam capstan. This anchor was put out and located under the directions of the officers of the Queen for the purpose of holding her, and to aid in withdrawing her from her perilous position, yet it was planted out in very nearly the same direction as that last occupied by the tugs in relation to the Queen. This is conclusive evidence that the officers of the Queen at that time thought this the proper direction to pull in order to work the ship in her bed and relieve her from her perilous.

position, and is a practical vindication by the respondents themselves of the judgment of Captain Flavel in pulling off the port quarter until the vessel should break up her bed of sand, and so become loosened and lifted up as to be in a position to float off by the united stern pull as afterwards applied. I will not go into this question further as to the propriety of the action of the libelants, but will say that success in fact, after repeated failures without their aid, vindicated their judgment, and that I fully concur in the finding of the district judge, which is affirmed.

“*Fourteenth*—That in the performance of the services the libelants on board the tugs, under the management of the libelant George Flavel, were exposed to considerable danger and risk, and that the tugs managed by libelant George Flavel were in considerable danger of destruction during the performance of the services.”

This finding is challenged, and is examined by the counsel for the claimant in the second subdivision of his consideration of the elements that are to be considered in determining the amount to be allowed for a salvage service. I will not attempt to give all the reasons that have led to my conclusion on this point. The finding, and the language in which it is expressed, commend themselves to my approval upon the evidence. The risk or danger may not have been and was not of the most extraordinary character, but it certainly was of such a character as to be worthy of great consideration. It was considerably greater than that of an ordinary towage service. If there was no other evidence, it would be sufficient to note that fears for the safety of the tugs were expressed by those on board the *Queen*; and, though the weather and the sea were not of the most dangerous character at the time, still the safety of those on board the tugs was identified with that of the tugs themselves, and in such a scene what would have been the result of any accident must remain largely a matter of conjecture. We know from general experience that on such occasions there is always more or less danger. The fact that Captain Flavel, in response to expressions of fear on the part of some of the crew, said, in tones manifesting some degree of passion,

1855.]

Opinion of the Court—Sawyer, C. J.

"Stay here; you can't drown, anyhow," is dwelt upon by the advocate for the claimants as showing *his* (Flavel's) estimate of the danger to be slight; but, taking the evidence altogether, I think the more reasonable view is that there must have been considerable danger when Captain Flavel found it necessary to quiet the apprehensions of experienced seamen by such a decided command. However that may be, it is not important, for it is plain that the tugs could not have been damaged to the extent they were—over three thousand dollars being allowed, and admitted to be just, for repairs to the tugs—if something more than ordinary risk had not been incurred. The damages allowed to the tug least injured were more than five hundred dollars. Again, the risk of grounding, some of them having thumped on the bottom, and of loss of one or more of the tugs, was not an ordinary risk; and, as before remarked, the safety of the crew was in a measure identified with that of the tugs they were on. I consider the finding a very proper one, and affirm it.

"*Fifteenth*—That no contract was made or entered into between the libelants and claimant in relation to the services so rendered by libelants as to the compensation to be paid or received therefor, and that the value of such services should be determined under the general admiralty law."

This finding is admitted.

"*Sixteenth*—That the bills presented by the intervenor Gray to George C. Perkins, and paid, were presented and paid under the apprehension that the libelant George Flavel would settle his demands on the basis of services rather than of salvage, and with the understanding that if it should prove otherwise, and legal proceedings for salvage should be instituted, then the rights of the intervenor should not be prejudiced by such settlement."

This finding is challenged, but I find the evidence of Captain Gray to be very clear, direct, and positive upon the point, and in comparing it with that of Governor Perkins, I see no reason to disbelieve it. Governor Perkins admits some such conversation, and so confirms Gray, but places a somewhat different construction upon it. But his memory

is not so decided nor so clear as Captain Gray's, and, as I have said, I can see no reason to doubt the latter; but if there were any doubt upon the question, the testimony of Mr. Noyes, a disinterested witness, that Governor Perkins afterwards said that Gray ought to share if the others received salvage, or remarks to that effect, would resolve it in favor of Gray. This finding will be affirmed with the exception of the word "apprehension." Apprehension conveys some idea of fear. I think the word "expectation" more nearly represents the state of facts disclosed by the evidence. With this alteration the finding of the Court below is affirmed.

"*Seventeenth*—That the value of the property saved is as follows: The Queen of the Pacific, \$485,000; her cargo, \$220,000; express matter, \$22,750; passenger fares, \$3,124.56; freight earned, \$5,912.28; making in all the sum of \$736,786.84."

This finding is admitted.

"*Eighteenth*—That the amount of cargo jettisoned was about 632 measurement tons, valued at about \$95,000."

This finding was admitted.

"*Nineteenth*—That the value of the property employed in performing the salvage services aforesaid was as follows: By the libelants, \$100,000; by the intervenors, Gray *et al.*, \$50,000; making in all the sum of \$150,000."

This finding was challenged, but the objection was abandoned on the trial, and the finding is considered admitted. I only care to remark upon this, as an element in determining a salvage award, that it is a considerable amount of property for salvors to put at risk. It is about one-fifth the value of all the property saved, which, as I have said, was itself an extraordinary amount; and the value of the property engaged in the salvage services is an important element in determining the amount to be awarded.

"*Twentieth*—That the expenses incurred by the libellant, George Flavel, in and about the performance of the salvage-

1885.]

Opinion of the Court—Sawyer, C. J.

services were as follows: For repairs to the tug Brenham, \$820; to the tug Columbia, \$1,120; to the tug Astoria, \$560; to the tug Pioneer, \$700; in all the sum of \$3,200."

This finding is admitted.

"*Twenty-first*—That neither of the libelants nor the intervenors would have been entitled to any compensation if the property had not been saved."

This finding is challenged, but upon what ground I am ignorant. The point has not been argued before me. The finding is affirmed.

"*Twenty-second*—That the libelants and intervenors are entitled, according to the rule of the admiralty law, to the sum of \$64,700, as compensation for the services rendered by them, which sum should be distributed among them as follows." [Here follows the distribution made by the district judge.]

This award is, of course, the great issue, and the only ultimate issue, contested on the appeal in the case, to the determination of which all other findings tend, and the remarks already made in considering them render any further discussion of the elements of the salvage service unnecessary. It simply remains now to determine whether this award is disproportionate to the services rendered. In arriving at a conclusion the whole case must be taken into view. The award is \$64,700 in all. It is liberal, but the case demands that it should be so. It would have failed to satisfy the rules and theories of admiralty law if it had not been liberal. The permanent interests of commerce and of the public, as well as of the underwriters and owners themselves, demanded that the award should be liberal. The elements which enter into the estimate in fixing the amount of compensation for a salvage service are: (1) The value of the property saved and of that employed in saving it. (2) The degree of peril from which the saved property is delivered. (3) The risk to which the property and persons of the salvors are exposed. (4) The severity and duration of the labor. (5) The promptness with which the services

are interposed; and (6) the skill, courage, and judgment involved in the services. In this case all the elements which go to justify the largest allowance are found, except that the duration of the labor was not long, and the risk or danger to the salvors and their property, though very considerable, was not of a very extreme character. It is seldom that so many of these elements are found in the same case. The peril of the property saved was very great. The destruction of the vessel seemed almost inevitable. The amount saved was large, as was the value of the property employed in saving it. The service was promptly rendered, and a high degree of skill, courage, and judgment displayed. The amount of property rescued from almost inevitable destruction is very large indeed—about three-quarters of a million of dollars. The risk to life and property of the salvors, while not of the highest degree, was well deserving consideration. The circumstances, therefore, demanded a liberal allowance, and as I have before said, the award is liberal, but I am not prepared to say that it is too liberal. On the contrary, taking the whole case into consideration, I am satisfied it is no more than true policy and justice require. The allowance is only about ten per cent. upon the value of the property saved. While the sum in the aggregate is large, the percentage upon the value is not so. The distribution of the award I shall not go into. The district judge had the parties and the witnesses before him, and I am satisfied that he considered well the distribution he made. It is satisfactory to me, and there is no complaint on the part of those claiming the salvage money allowed. The finding is affirmed.

There are certain other intervenors in the case, though how they get here is a question. On looking at the records I find they never filed any stipulation for costs in the district court, either upon filing their intervention, or at any other time, and the only way they appear before me is by this notice of appeal. No one appeared for them in court at the oral argument, and I only found out that they were making any contest here by accidentally discovering a shortcoming of their points among the papers. Their cause

1885.]

Opinion of the Court—Hoffman, J.

was considered abandoned in the district court, and their intervention was ordered dismissed. I affirm that decision.

The decree of the district court in this cause is affirmed.

I have concluded to allow six per cent. interest—maritime interest—upon the amount of the award from the date of the decree in the district court. Counsel, in preparing the findings and decree of this court, will conform to those of the district court in all respects, except in the particular I have mentioned relative to the conditional settlement with Captain Gray. For the word “apprehension” will be substituted the words “under the expectation and upon the hypothesis.”

IN RE JUNG AH LUNG—ON HABEAS CORPUS.

IN RE JUNG AH HON—ON HABEAS CORPUS.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 13, 1885.

1. CHINESE RESTRICTION ACT—RIGHT OF CHINAMAN DETAINED ON BOARD VESSEL TO HABEAS CORPUS—The refusal to allow a Chinese passenger to land is a restraint of his liberty, within the meaning of the habeas corpus act, and it is the duty of the court, justice, or judge to whom the application for a writ of habeas corpus is made, to forthwith award the writ, unless it appears from the petition itself that the party is not entitled thereto. (Rev. Stat., sec. 755.)
2. SAME—DECISION OF COLLECTOR NOT RES ADJUDICATA—The court, in investigating the legality of the detention of a Chinese passenger on board a vessel, in such a case, is not bound or controlled by the decision of the collector of the port, or his deputy, as to the right of such passenger to land.

Before HOFFMAN, District Judge.

Mr. Wm. F. Gibson, for petitioners.

Mr. S. G. Hulborn, for the United States.

HOFFMAN, J. (orally). The intervention filed by the district attorney challenges the jurisdiction of the court upon two grounds:

First. That the petitioner is not restrained of his liberty within the meaning of the habeas corpus act.

Second. That the collector has already investigated and passed upon the petitioner's right to land. That the question is, therefore, *res adjudicata*, and that the court is bound by the collector's decision, and has no right to further examine into the matter.

First. It is admitted that the petitioner is of the Mongolian race; that he is on board a steamer recently arrived at this port, from which he is not permitted to land. The mode of his restraint is not specified, but if restrained lawfully, any force necessary to prevent his leaving the ship can rightfully be applied.

It is not denied that it is the intention of the master to retain him on board the ship until her departure, and then to convey him to the port in China from which he came, unless in the mean time the petitioner may find means of getting on board some other ship without landing on our shores, to be conveyed by her to some foreign country.

Whether this proceeding be lawful may involve important questions of law and of fact. The petitioner is a free man under our flag and within the protection of our laws. If the denial, therefore, to the petitioner of the right to land, thus converting the ship into his prison-house, to be followed by his deportation across the sea to a foreign country, be not a restraint of his liberty within the meaning of the habeas corpus act, it is not easy to conceive any case that would fall within its provisions.

The second objection raised by the district attorney is that the restriction act commits to the collector the duty of deciding upon the right to land of any Chinese persons arriving in this country; that his decision is final and conclusive, and that this court has no right to review it on the return of the writ of habeas corpus.

This claim of exclusive jurisdiction on the part of the collector must be derived from the provisions of the ninth section of the act of 1882, for no other section of the act affords the slightest color to such a pretension.

Section 9 is as follows: "Before any Chinese passengers are landed from any such vessel, the collector, or his deputy, shall proceed to examine such passengers, comparing

1885.]

Opinion of the Court—Hoffman, J.

the certificates with the list and with the passenger, and no person shall be allowed to land in the United States from such vessel in violation of law."

It will be perceived that the duty imposed upon the collector is to make the examination mentioned in the section. He is not, in terms, directed to prevent the landing of passengers, but it may reasonably be inferred from the clause which forbids any passengers to be landed in violation of the law, that it was intended that he should carry out that provision. But the section affords no color to the extraordinary pretension that the result of that examination shall be final and conclusive upon the rights of passengers. Such an abrogation of the writ of habeas corpus, which has always been considered amongst English-speaking peoples the most sacred muniment of personal freedom, must be unmistakably declared by Congress before any court could venture to withhold its benefits from any human being, no matter what his race or color.

It seems to have been in some quarters overlooked that the restriction act does not prohibit the coming into this country of all Chinese persons.

First. The restriction is, both by the treaty and the act of congress, confined to Chinese laborers, and persons other than Chinese laborers are not within the prohibition.

The passenger arriving here may be a Chinese merchant, student, traveler from curiosity, or other person not a laborer. The inquiry into his status in this respect is often exceedingly difficult.

Second. He may also hold a certificate issued by the custom house, authorizing him to re-enter the United States. The question whether such certificate has been fraudulently obtained, and whether the person holding it is entitled to its protection, is frequently raised, and often very difficult of solution.

Third. He may also, under the decision of the supreme court, be entitled to land without a certificate, if it shall appear that he resided in the United States at the date of the treaty, and departed therefrom before the restriction act went into operation, and before it was possible for him to

Opinion of the Court—Hoffman, J.

[October,

obtain a return certificate from the custom house. This inquiry also is exceedingly difficult.

Fourth. He may be entitled to land on the ground that he was born in this country, and has therefore the full rights of an American citizen.

Here, also, difficult questions of fact may arise for determination. The collector, who, it is suggested, is charged with the exclusive decision of these questions, is not of necessity a lawyer. He discharges his duties by deputy. He is not authorized to administer oaths to witnesses, nor to compel their attendance. The discharge by him of the duties, heretofore supposed to belong to the judicial department of the Government, would be almost impracticable, unless the other duties of his office be neglected. It is believed that in this class of cases the collector has rarely personally concerned himself with their examination. If I am right in the opinion that a Chinese person, like every other human being in this country, is entitled to the benefit of the writ of habeas corpus, in order that it may be judicially ascertained whether the restraint of his liberty be lawful or unlawful, to require the court in its investigation to be governed by the decision of an executive officer, acting under instructions from the head of the department at Washington, would be an anomaly wholly without precedent, if not a flagrant absurdity.

The right to a writ of habeas corpus is the right to have the lawfulness of the restraint to which the petitioner is subjected inquired into by the courts; to be adjudged and determined by the law of the land. It has not as yet been committed to any purely executive officer. I am therefore clearly of the opinion that it is the duty of the "court, justice or judge to whom such application (for writ of habeas corpus) is made, to forthwith award writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." (R. S. Sec. 755.)

The performance of this duty the court is not at liberty, on any pretext, to evade.

That on the return of the writ it is the duty of the court to inquire and determine whether the restraint is lawful,

1885.]

Points decided.

independently of any previous decision of the question by the collector or his deputy, or by the surveyor, or by the inspector of customs stationed on board the vessel.

If the position taken in the intervention of the United States attorney be sound, an extraordinary circumstance must be noted. The restriction act has now been in operation for nearly three years and a half, and numerous cases on the return of the writs of habeas corpus issued on the application of Chinese persons had been presented to Mr. Justice Field, to Judge Sawyer, circuit judge, and the district judges of Washington Territory, Oregon, Nevada and California.

Similar cases have also arisen in the federal courts in Boston, New York and Philadelphia, and on appeal have been decided by the supreme court of the United States.

It has never been suggested by any judge or district attorney that the refusal to allow a Chinese passenger to land was not a restraint of his liberty, the lawfulness of which was to be inquired into by the courts, nor has the still more extraordinary pretention until now been set up that in such inquiry the court, whether the supreme court of the United States, the circuit court or the district court, was to be controlled by the decision rendered by the collector of the port or his deputy.

The demurrer to the intervention is sustained, and the district attorney is allowed to file an intervention contesting the merits of the application.

GOLDMARK ET AL. v. KRELING ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 23, 1885.

1. INJUNCTION AGAINST UNLAWFUL PRESENTATION OF OPERA, WHEN ISSUED.—The owner of a literary work, such as an opera, not protected by a copyright, is entitled to an injunction against its unauthorized presentation, upon giving approved security. In such case the right to recover damages for the unlawful production of the opera, is not an adequate remedy.
2. THE SAME—PRELIMINARY INJUNCTION—ADDITIONAL SECURITY MAY BE ORDERED.—Where a preliminary injunction is granted, upon complainants giving a bond, if counsel for the respondents have not had an opportunity to be present at the approval of the bond, the court, sitting as a

Statement of Facts.

[October,

court of equity, has power, upon petition, promptly made, or affidavit, showing the sureties to be insufficient, and notice to the other side, without regard to other proceedings, at any proper stage of the case, to require an additional bond to be given, as a condition of the continuance of the injunction. Such application should be promptly made, otherwise the right to object will be deemed waived.

3. **THE SAME—RIGHT TO INJUNCTION WHEN NOT LOST BY FAILURE TO FURNISH SECURITY IN TIME.**—The complainants, as owners, filed a bill to restrain the defendants from producing the opera of "Nanon." Such opera had never been copyrighted. An order to show cause why an injunction should not be granted, was issued, returnable on a day fixed. After several delays, no cause having been shown against it, an injunction was issued, on condition that the complainants give bond in the sum of ten thousand dollars. The bond offered being deemed insufficient by the court, the injunction was dissolved upon the defendants filing an indemnity bond. The complainants thereupon moved to set aside the order dissolving the injunction, at the same time offering a certified check for ten thousand dollars, or an equal amount of coin, as security. *Held*, that such order should be granted; that complainants' right to an injunction was not lost by reason of their failure to furnish a sufficient bond in the first instance.
4. **DISTINCTIONS BETWEEN THE PRESENT CASE AND CASES INVOLVING the infringement of patents and copyrights**, so far as the complainants' right to a preliminary injunction is concerned, stated and discussed.

Before SAWYER, Circuit Judge, and SABIN and HOFFMAN, District Judges.

This is a suit in equity to enjoin the production of an opera of which complainants claim to be the proprietors,—a suit resting upon the common law right of the author, not on a copyright.

The sureties offered on a bond required to be given by a prescribed day upon the granting of an injunction, after several hearings, having failed to justify to the satisfaction of the district judge of Nevada, before whom the proceeding was pending, he dissolved the injunction upon that ground, upon defendants giving a satisfactory bond in the sum of ten thousand dollars, to pay such sum to complainants as should be recovered in the suit. The complainants on affidavits, showing their good faith, and excusing their failure to present sufficient sureties at the proper time, promptly moved, before respondents' bond had been approved, to vacate the order dissolving the injunction, upon the indemnifying bond given by the defendants, and to

1885.]

Opinion of the Court—Sabin, J.

restore the injunction before granted; and they offered to deposit a certified check upon some solvent bank for the required amount, or to deposit the coin in court, in lieu of a bond. The application was denied, but, the point being new, and not being entirely satisfied with this action, the judge, who heard the application, granted a rehearing, and, upon such rehearing, invited the circuit judge and the district judge for the district of California to sit with him.

After argument on the rehearing the following oral decisions were rendered.

Mr. Jos. D. Redding, for the complainants.

Mr. H. H. Lowenthal and *Mr. W. W. Cope*, for the respondents.

By the Court, SABIN, District Judge. I do not deem it necessary to review, at length, the history of this case, as it is certainly very well understood by counsel and probably by the bar who have been in attendance. We deem the case a very important one. I believe it is the first case of the kind that has ever been brought in this court. While innumerable cases have been brought on copyrights, patents, etc., I believe this is the first case brought in this court, or, possibly, upon this coast, wherein a complainant has sought to restrain a defendant from producing a play, or any matter of this kind, not upon copyright, but upon common law right.

I have been inclined to look at this case very much from the standard of cases that are brought upon patents and upon copyrights. I am inclined to think there is a distinction in the cases, and nearly all the cases cited to the court during the argument on this matter have been cases upon copyrights or patents. There have been, perhaps, three or four cases cited to the court very similar to this, where parties have sought to enforce their common law rights. They are different, however, from this case, in this: In those cases it was upon motion and argument before the court whether or not an injunction should issue, and not, as in this case, where no argument has been made before the court as to whether or not an injunction should issue. It was conceded

in this case, virtually at least, that it was a proper case for an injunction to issue. No opposition, as I understand, has ever been offered to its issue. There has been no contest on the sufficiency of the bill in this case, therefore, the injunction issued regularly thereupon. The only question, really, before the court, as I observed yesterday, is: Was the order made by myself on the sixteenth of this month, dissolving the injunction upon the defendants' giving security, under all the circumstances of the case, a complete and full indemnity to the complainants in this case?

I do not care to review, at all, my action in regard to the sureties in this matter. I merely desire to say, now, that the bonds tendered in this matter by complainants, thus far, are not satisfactory to me, nor am I at all satisfied with the manner in which the matter was conducted. I think bonds could very easily have been procured by complainants. It was only a small amount—ten thousand dollars—and I do not think the security thus far offered in the case, by complainants, was such as the court ought to have accepted. I think that my action, in that respect, was entirely correct. Of course, when a bond is given it is given in good faith and for indemnity to the parties who may suffer injury in the action, if the complainant should not succeed in his case. I do not think the bond tendered afforded the security that it was the duty of the court to enforce in a case of this kind. But I am not wholly satisfied that the indemnity afforded by the order of the court, that the respondents give a bond of ten thousand dollars, is a full and adequate remedy for the complainants in this case.

As I observed, this case is different from a suit brought to restrain an infringement of a patent, or of a copyright, and there is great force in the point urged that if any parties are permitted, in violation of complainants' rights, to produce this play, it may, and possibly would, cause irreparable damage to the complainants, if they are the lawful owners of this opera of "Nanon," and they only have the right to produce it. As the matter now stands on the bill, unquestionably they are the lawful and exclusive owners, and have the exclusive right to produce it.

1885.]

Opinion of the Court—Sabin, J.

There is also, to my mind, great force in the suggestion that the owner, as in this case, of a play or opera, or other property not protected by patent or a copyright, is entitled to select his licensee. One party might produce this individual opera, and, perhaps, the complainant might suffer no very great damage. It might be an advantage in the way of an advertisement, or otherwise. Another party might produce it, and it might be of the very highest detriment to the complainant, and absolutely ruin its production elsewhere. As to who shall produce it, even if, as in this case, the parties owning it do not produce it, but merely license other parties to produce it, they have the most indubitable right to say who those parties shall be. I am inclined to think that, perhaps, I gave too much weight to the idea that in the giving of indemnity by these respondents, they were giving ample security to the complainants. If I was in error in that, of course the order should be corrected.

We have given this case unusual attention. I have invited Judges Sawyer and Hoffman to sit with me. I have desired to be guided by their very large and varied experience in matters of this kind, for my own experience has been somewhat limited, and this is the second argument I have ordered on this matter. We have given it very careful and anxious consideration, not only to be right as to these complainants, but to be right as to any and all parties, to establish the true and correct rule.

I am inclined to think that perhaps in the order made by me on the sixteenth, I may have overestimated the security I was giving to the complainants in this case; that perhaps I should have given them still further time to have procured sufficient bondsmen. It is true, parties offered on that day, about the time the court was announcing its opinion, to furnish a certified check in the sum of ten thousand dollars. It was either offered at that time, or to be ready by two o'clock. I declined that at the time, for the simple reason that I thought sufficient time had been afforded them, and that the security which I would require the respondents to give would be ample indemnity to complainants. I now think under the authorities, and under

Opinion of the Court—Sabin, J.

[October,

what may occur in this or any like case, that that indemnity is not full and ample. I am inclined to the opinion that nothing but an injunction in the first instance will reach the case.

A motion can always be heard either on the coming in of the answer, or a motion can be heard at any time to dissolve the injunction on affidavits. Of course, no steps of that kind have been taken in this case. It stands merely on the bill as presented, without objection made to the bill.

Mr. COPE—We could not have done that without waiving our objection to the bond.

Judge SABIN—I do not think that would have obtained in this court. In any event, the court, in justification of itself, would have required good security to be given. I would have given you an order to show cause on these sureties, at any time. This might often happen. You might give a bond which would be ample to-day, and three months hence a surety might die, and an order to show cause would be granted why you should not produce further security.

An offer was made the other day by complainants in this case to deposit gold coin in court, if the court should order it, or a certified check. If the money should be paid into court, it would have to be paid into the treasury, and it is considerable trouble to pay it in, and get it out. A check, therefore, is more satisfactory. I think, therefore, the order, as made the other day, should be vacated, or at least, modified, and the order of the court will be that the order made on the sixteenth, dissolving the injunction, be vacated; that the injunction heretofore issued be continued, upon the complainants depositing with the clerk to-day, by three o'clock, a certified check payable to the order of the clerk in his official capacity, as clerk of the court, in the sum of ten thousand dollars, upon some solvent bank in this city. Leave will be granted to the complainants, at any time, upon notice, to withdraw the check upon giving good and ample security in place of it. Notice of the application and the names of the sureties intended to be offered must be given. I do not want any question to arise again as to the examination of sureties, and their sufficiency.

1885.]

Opinion of Sawyer, C. J., concurring.

SAWYER, Circuit Judge, concurring. I have considered this matter very carefully, and have come to the same conclusion as my associate. There was an order to show cause, with a preliminary restraining order, granted. The parties appeared, in response to that order, and, upon the hearing, an injunction was granted by the district judge of the district, till the further order of the court, with leave to the parties to move to dissolve it. The parties did not see fit, or were not prepared, to present any matters outside of the bill. The injunction was continued, upon condition that by a specified day a bond should be given in the sum of ten thousand dollars, to be approved by the clerk. A question arose upon the sufficiency of the proposed securities upon that bond. The clerk was about to pass upon the bond, when an application was made to the court, and granted, to transfer the question of approval to the court, and the matter was considered by my associate, the district judge of Nevada, then holding the court, during my absence in Oregon.

He did not assume to review the prior action of the court as to the injunction granted,—either the proceedings of the circuit judge in granting the preliminary restraining order, or of the district judge of this district in granting the injunction on the hearing of the order to show cause. The only question was as to the sufficiency of that bond,—whether the parties had conformed to the conditions of the order granting the injunction.

As the matter stands, the injunction granted rests solely upon the bill, and we are satisfied that the bill presents a sufficient ground for the injunction. There was some delay, and the impression upon the mind of my associate was, that the parties were not acting in good faith. One surety, who had been rejected once, was offered again. I am, perhaps, partly responsible for the decision of my associate upon the point under consideration. On my return, I found that he had had several hearings upon the justification of the sureties—indulgence having been given from time to time—and, from what had taken place before, he was apprehensive that, on Friday, the day fixed for the next hearing,

Opinion of Sawyer, C. J., concurring.

[October,

there might still be further delay. Expressing his apprehension to me, we consulted, and I was of the opinion then, that in case there should be further delays, and especially if there should be indications of trifling, the defendants were entitled to have the injunction dissolved, on their giving proper indemnity to complainant.

But I had not fully considered the case. It presented questions entirely new to me, and my suggestions, upon imperfect knowledge of the facts, may have influenced my associate in making the order in question. If so, I am willing to take my share of the responsibility. When the examination came on, it turned out that the surety was again rejected, and when the judge was about to announce his decision,—indeed, not till he was in the act of announcing it,—an offer was made to deposit the money, but the offer was regarded, at the moment, as coming too late, and, the order complained of made. The only question is: whether that offer ought, under the circumstances, to have been accepted. There had been some provocation. The court was impressed with the idea, doubtless, that it was being trifled with. On the application to modify that order, I think the parties have, satisfactorily, shown by affidavits that they acted in good faith. They, perhaps, ought not to have offered a rejected surety again. I think they were at fault in that. Still, I am not only satisfied, that the solicitor for the complainants, whom I have known for years, was acting in entire good faith, but I believe him to be incapable of acting otherwise. I think under the circumstances, also, that the complainant, Goldmark, a stranger just arrived from New York, his financial condition being unknown here, and he being in these particulars in an embarrassing position, was acting in good faith.

That being so, upon a review of this matter, as it now appears to me, I am satisfied that further opportunity should have been given complainants on that occasion to perfect their security, even though the money was not tendered till after the judge had commenced to announce his decision.

With reference to the indemnity which was given by the respondents, although the amount was sufficient, and the

1885.]

Opinion of Sawyer, C. J., concurring.

bond good, it, in my judgment, affords no adequate remedy, if any remedy at all. This case differs from a patent case. Take, for instance, a patent for a sewing machine. A party may, in good faith, think that a machine of a certain construction, different in form, but in reality the same in principle, as the one patented, is not an infringement. There is, generally, in the case of patented articles, a royalty established, upon the payment of which, any man is allowed to make, or use the patented machine, or article. A large manufactory may be erected, and the manufacture of sewing machines, or other patented articles, be commenced, and it may turn out that there is an infringement on a patent, although the point, at the hearing of the application for an injunction, may appear doubtful. To stop that work, pending the suit, would be ruin to the manufacturer, even if he turns out to be in the right, whereas, all that the patentee wants, or can obtain, in case he succeeds, is his damages, and a remuneration according to the amount which he has fixed as his royalty. Providing he can get that, the more machines there are manufactured and sold, the better it is for him. In such cases, in matters of doubt, whether the machine is an infringement or not; whether the patent is valid or not; or whether it has been anticipated or not, where the complainant can be fully indemnified if he succeeds, and where the defendant would be ruined by an injunction, if the complainant fails to sustain his suit, courts, in view of the great disproportion of the hardship that may result to the respective parties, have, very often, declined to grant or continue an injunction on the infringing party's amply indemnifying the patentee. An adequate indemnity is given, where the patentee's royalty, profits and damages are perfectly secured. In these classes of cases, there is, usually, some tangible, appreciable, fixed, and ascertainable measure of the amount to be recovered.

Besides, in a patent case, by the express terms of the statute, a patentee in a suit in equity to enjoin an infringer can not only recover the profits, or royalty, but also any damages he may sustain, in addition to the profits. It often happens that the profits of an infringer in a patent case are

Opinion of Sawyer, C. J., concurring.

[October,

greatly less than the damages sustained by the patentee by the infringement; because the patentee is entitled to fix his royalty, and to fix the price for which he will sell his invention, and that must be sufficient to give him his established compensation for his invention, in addition to the cost and profits of manufacturing.

Take a sewing machine, and suppose the royalty is fixed at fifty dollars, over and above the profits of the manufacture—and I think some are higher—the infringer may manufacture and sell at such low prices as to give him a bare profit on his investment and the manufacture, so that the profits might be just enough to compensate for his investment and labor, leaving nothing for the royalty. The patentee, however, in addition, is entitled to recover his royalty. The profit which the infringer may make at the price he sells would often afford no compensation to the patentee for his invention. He would be remediless if that were his only right. The act of congress itself provides that the patentee may not only recover the profits, but, also, his damages in the same suit, in addition to the profits. Not only that, but the court is authorized to treble the damages, in order that the patentee may be completely and thoroughly indemnified against the acts of the infringing party. That is all by virtue of the statute. Otherwise, if the patentee wanted damages, he would have to proceed by his action at law. The statute authorizes him to demand both of these remedies in the same suit, and then authorizes the court to treble the damages. I myself have had occasion to impose the penalty, where the infringement had been a gross and willful violation of the patentee's right, and where the infringement had been continued by the same party after one or more recoveries.

So, in a copyright case, the only compensation for the party owning the copyright is the amount he charges for his copyright fees. He fixes his copyright fee. If this were a case of copyright, there would be a distinct, definite, appreciable, fixed, ascertainable measure of damages, which would be the copyright fee, and no matter who infringed the copyright, when the infringer has paid that fee he has paid.

1885.]

Opinion of Sawyer, C. J., concurring.

the full amount the party himself is entitled to receive, and the more there are sold the better he will be off, provided his fee is perfectly secure. His right exists under the statute. Under the statute both the profits and the damages might be recovered in the same suit. An indemnity in doubtful cases, secured for the infringement during the litigation, would afford an ample remedy.

But this case is wholly outside of any statute. It rests simply upon the common law. A party has either his action at law for his damages, or his bill in equity to restrain the defendant, and recover such profits as he can obtain. The only measure of his compensation in a suit in equity would be the profits received by the wrong-doer. That is all that would be recovered in this case. The bond given by the defendants, in fact, only provides for the payment of such profits as may be recovered by the violation of complainants' rights in this case. What is the measure of the compensation in this case? There is no definite measure. The profits are merely conjectural. There may be no profits. The parties who infringe the complainants' right may put their prices at such figures that there could be no profits. The injured party must go to the wrong-doers to ascertain what their profits are. The expenses, and the prices of the representation, are under their control; and the performance may only be ancillary to some other business upon which they rely for their principal profits. It will be safe to say that the profits recovered are likely to be very limited.

Prior to the filing of this bill there were two performances. The bill simply asks for an accounting of the profits down to that date. There were two performances that would be covered, unless the bill is amended, or the complainants are, otherwise, entitled to the profits down to the accounting, and the profits that can be proved are certain to be very small. There is no knowing how long the infringement may go on before the final decree, or under what circumstances. The interest of defendants will be to delay a final hearing as long as possible. The opera may be performed under such circumstances as to render its performance by the owner futile. The owner is entitled to select his licensee,

Opinion of Sawyer, C. J., concurring.

[October,

and to determine the conditions upon which his work shall be presented. This must be essential to any adequate protection and any proper, complete enjoyment of his property.

On the bill, as it now stands, there is a clear right to this injunction, upon giving the proper security. This is the only adequate remedy. As we now regard it, we hold the bill to be sufficient. What view we may take after argument, or on a showing upon any application to dissolve, that may be made, I do not know. There is, then, a right to this injunction, or to some equally adequate remedy, and the indemnity by giving bonds is plainly not an adequate remedy. Where the profits are under the control of and depend upon the acts performed and evidence furnished by the infringing party, there is likely to be a very poor compensation if this case should run on for some time. The profits are liable to be extremely small, so far as the complainants would be able to prove them. A bond for these profits, we are satisfied, would afford no reasonable remedy. The case, as we have seen, is not like that of a patent, where it makes no difference who makes the machine, provided the patentee gets his royalty. It is not like a copyright case, where the right and measure of compensation are fixed—where the main elements by which the amount can be determined are known beforehand. In this case, the amount is indeterminate, and depends altogether on the action of the party who wrongfully infringes the rights of the complainant—who tortiously appropriates complainant's property.

In view of these considerations, I think the distinction between the cases of patents and copyrights, and this case, very broad. It is true, in one or two cases recently reported in the newspapers, a similar order was made, but it was not made under similar circumstances. That order was made on the hearing of an application for the injunction, where the defendants came in and put in their proofs, and made a very strong case. Take the most prominent case, *Tracy v. Janisch*. The defendant put in her proofs fully, by affidavits. It appears, according to the numerous affidavits, that defendant was a citizen and resident of Paris, and she alleges—and the proofs went far to show—that the

•

1885.]

Opinion of Sawyer, C. J., concurring.

work had been published in that city from year to year, for some years, with the owner's knowledge and consent, and that the complainant's right had been, consequently lost. A number of affidavits were put in to sustain the proposition. It was extremely doubtful, whether the complainant had any rights at all. That was on the hearing of the application. If this was on the hearing, that case would have some application, and it would be proper to quote it. But there, it was a case of extreme doubt, whether the party was entitled to an injunction at all. If not, the hardship on defendant was peculiar and great. Her injury would have been irreparable, had she been enjoined, and the court exercised its power, under the great hardship of the case, because the defendant had had the work prepared from what she maintained was a public work in Paris; had come to this country expressly to perform it; had organized her troupe; and had no other piece to perform. The failure to produce that piece, would be the loss of her season, and the entire destruction of her enterprise. Under these circumstances and proofs, it was extremely doubtful whether the injunction should be granted at all.

When this case comes to be heard on the answer, evidence and proofs, the court may find occasion to change its order. It may be, that there are some special circumstances to be developed, which will change the entire aspect of the case. But they are not yet developed, and on the case as it now stands, there is a right to this injunction, or some other adequate remedy, and we know no other that would be adequate. A sufficient certified check having been offered before the order for dissolution was made, I now think, the order dissolving the injunction upon the bond of defendants was made without due consideration of the inadequate remedy afforded, and the consequences to complainant.

I, therefore, concur in the present order.

With reference to the hardship that may occur in this case, it is proper to observe that no general appearance has yet been entered by the defendants, unless the appearance to respond on the bill to the order to show cause, can be held an appearance within the meaning of the statute.

Opinion of Sawyer, C. J., concurring.

[October,

Whether or not it is, I am not prepared now to say. It was within twenty days of the rule day, when this suit was commenced, and the defendants had till the rule day of the following month, in which to appear. They had over forty days within which to appear—the rule day in November being the day upon which they would be required to appear. They could, therefore, rest on their oars until that time, and not appear. Having, formally, entered their appearance, they would then have until the rule day of the following month in which to answer, or demur. They were bound, however, to appear to the order to show cause. They did appear, and the injunction was granted without a showing, other than on the bill, against it.

Suppose this injunction is dissolved, and defendants do not appear at all until the rule day, in November, and then take until the following rule day, which they have the right to do—because the law gives them that right—in which to answer. They may then demur. In that event, the case will go upon the demurrer calendar of the next rule day, and, under the press of business, it may be months before the demurrer can be decided or regularly reached. It might be overruled, and a plea put in, and several months more be consumed in disposing of that plea. Then after, at last, filing an answer, there are three months in which the party is entitled to take testimony. Should this injunction be dissolved, the performance by defendants might run through a year or more, and everything there is worth having in this opera, so far as its performance on this coast is concerned, might be appropriated by the defendants, and at the end there be no profits, by reason of the expenses, manipulation, low prices, or improper production by the wrongdoers.

We think it would be a great hardship on the complainants, to allow the matter to stand in that position. These possibilities should be taken into consideration in determining the right of complainants to have the order complained of vacated. On further reflection we are satisfied that additional time should have been given to the complainants to produce other and sufficient sureties, or that the certified check should have been taken in lieu of them.

1885.]

Opinion of Sawyer, C. J., concurring.

These are our more mature convictions. If I made a mistake in advising my associate on an imperfect knowledge at the time, of all the facts of the case, and without due consideration of the consequences of the action of the court, I am desirous now to correct my error. With all the care I take, mistakes will sometimes occur. So far as my responsibility, as to that order goes, I am prepared to remedy it now.

I desire, in connection with this matter, to make some other observations. There was, manifestly, a misapprehension on the part of counsel, as to the practice of this court in a justification of sureties. It was insisted by counsel for defendants, yesterday, that they would have waived their right to object to the sureties had they come in with their affidavits and opposed this injunction, or had they moved, under the leave given in the order granting the injunction, to dissolve it. I think they are entirely mistaken. The two motions might have been made simultaneously, and gone on together, *pari passu*.

It was announced here that they were bound under the rules of the court to except in five days to the sureties, or there was a waiver. I stated at the time that I recollected no such rule. There is no such rule of this court. If there is, I have been unable to find it, either in the equity rules prescribed by the supreme court of the United States or in the rules adopted by this court. Counsel seem to have been misled by the code of civil procedure. They are entirely mistaken as to the practice of this court.

Where counsel have not had an opportunity to be present at the approval of a bond by the clerk, when it has been ordered to be approved by him, upon a petition to the court, made, promptly, or affidavits, showing the sureties to be insufficient, and notice to the other side, I suppose the court has full authority, without regard to other proceeding, at any proper stage of the case, to require an additional bond to be given, as a condition of the continuance of an injunction. Upon the equity side of the court, at least, I have no doubt that it is within the authority of the court in this manner to require insufficient security to be made ample; it

Opinion of Hoffman, J., concurring.

[October,

is only on the law side that the practice act of the state in such matters prevails. Doubtless, the application should be, promptly, made, and an unreasonable delay would be regarded as a waiver of a right to object. But the matter would rest in the sound discretion of the court.

Again, after a bond is given, the sureties may become insolvent. I have no doubt of the authority of the court, upon a petition, stating the facts, and notice to the other side, to examine that matter, and if it is found that the sureties are insufficient, that additional sureties may be required. There must have been a misapprehension by the parties as to the practice on the equity side of this court, in that particular.

HOFFMAN, District Judge, concurring. I do not know whether I have a right to partake in this decision, or whether I form a part of the court. The circuit judge issued an order to show cause why an injunction should not be granted. That order was returnable on a day fixed. It came up before me. Counsel were not ready. It was postponed, by consent, to a further day. On that day counsel again announced that they were not ready. Thereupon the injunction issued, no cause being shown against it, with leave to move to dissolve at any time. The order was on condition that the complainant give security. They attempted to give security. I concur in all, and more than all, that my associates have said, as to the insufficiency of the sureties offered.

But the question is: Did the failure to offer that security forfeit the right to an injunction, and forfeit the rights of complainant, which he must be presumed to have, under the allegations of the bill? I think it did not. When he offered to remedy his previous neglect by depositing a certified check or money, the court obtained all it originally asked for, and the injunction should have gone, and been continued, subject always to the right of the other party to move to dissolve it.

On this motion to review the action of the court, it appears to me that the question whether the injunction

1885.]

Points decided.

ought to be dissolved or not, upon a proper application and hearing, has no relevancy.

I do not pretend to have considered this matter as thoroughly as my associates have done. The bill in this case, it seems to me, is like a bill to restrain a person from destroying heirlooms or publishing family letters, where, if the thing is done, the injury is irremediable. It is easy to see that an accounting for profits would not afford any indemnity. It is right of an owner of a piece of literary property to be protected. His pride as an author must be considered. He has the right to choose his own licensee. His play might be played for months, not at a profit, but at a loss. In the meantime, not only will the market be spoiled for a subsequent production by the owner of the opera in this town, but the reputation of the opera injured. It appears to me it is a case for an injunction. But that is not the point on which I base my concurrence, on the ruling of the court. I think that, on a review of the order dissolving the injunction, the question is, not whether the injunction should originally have gone, or should now be continued, but whether, under the circumstances, it ought to have been dissolved.

There is no absolute forfeiture of the right to an injunction because complainants have failed, under the circumstances, to comply with the order of the court requiring them to give security. If the opposite side are advised that the injunction ought to be dissolved, let them move to dissolve on notice to complainants.

LAKIN v. SIERRA BUTTES GOLD MINING Co.**CIRCUIT COURT, DISTRICT OF CALIFORNIA.****OCTOBER 26, 1885.**

1. **CONSTRUCTIVE TRUST.**—Where one party, wrongfully, obtains the legal title to land, which, in equity and good conscience, belongs to another, whether he acts in good faith, or otherwise, he will be charged, in equity, as a constructive trustee of the equitable owner.
2. **A BONA FIDE PURCHASER,** is one who purchases, in good faith, an estate for a valuable consideration, actually paid, without notice of a prior equity.

3. **BURDEN OF PROOF.**—The burden rests on the party claiming protection as a *bona fide* purchaser, to prove, affirmatively, the payment of value, and, that the purchase was made without notice of the prior equity.
4. **CONSIDERATION IN DEED NOT EVIDENCE.**—An acknowledgment of payment of consideration in a deed, is not evidence of payment of value, as against the owner of the prior equity.
5. **AGENCY—NOTICE.**—The knowledge of an agent, in respect to the subject matter of the agency, is the knowledge of the principal.
6. **ABANDONMENT**, of a mining claim, is a voluntary act, on the part of the owner, and when relied on, as a defense, must be proved by the party alleging it.
7. **FORFEITURE.**—A party who has forfeited a mining claim by failing to work it as required by law, may continue his right by resuming work, at any time, before any other party has re-located on the ground of forfeiture.
8. **PATENT SURREPTITIOUSLY OBTAINED.**—T. and McG., being owners of a mining claim, had a survey made, applied for a patent, published the notice as required by the statute, and no adverse claims having been filed, their right to a patent became perfected. Afterward the M. Co. claiming, without right, to be successor in interest to T. and McG., surreptitiously, procured a patent to itself on the application of T. and McG. *Held:*—That the M. Co. held the title so obtained, charged with a constructive trust in favor of T. and McG., and that it did not lie in the mouth of the M. Co., to say, that T. and McG., have lost their right to the claim by forfeiture, or otherwise.
9. **STATUTE OF LIMITATIONS IN EQUITY.**—The statute of limitations, as such, is not a defense in a court of equity of the United States. The defense in such court, is, laches in not pursuing the proper remedy, for such time, and under such circumstances, as renders it inequitable to grant the required relief.
10. **ANALOGY TO STATUTE OF LIMITATIONS.**—But courts of equity will adopt, by analogy, the time prescribed by statutes of limitations, unless there are other equitable circumstances, deemed sufficient to relieve the party from the charge and consequences of laches.
11. **PLEADING OF LACHES, ETC.**—No formal plea of the statute of limitations, or of the special facts, is necessary to raise the defense of laches, neglect, or acquiescence, in a court of equity.
12. **THE FOUR YEARS, LIMITATION** applies to this case, as stated in the eighth headnote, it not being, technically, a suit for "relief on the ground of fraud."
13. **STATUTE OF LIMITATIONS—CONSTRUCTIVE TRUST.**—The statute does not begin to run against a *cestui que trust* in possession, until an ouster, whether the trust be express or implied.
14. **LACHES.**—What equitable circumstance will defeat the defense of laches, considered.

EQUITY. The opinion states the facts.

Messrs. Vanclief & Gear, for the complainant.

Messrs. Garber, Thornton & Bishop, for the respondent.

1885.]

Opinion of the Court—Sawyer, C. J.

SAWYER, Circuit Judge. This case was submitted more than a year ago, but soon after its submission, I was requested by counsel not to take the case up for decision, as negotiations for settlement were pending, and, probably, it would not be necessary to decide it at all. Consequently, I laid it aside. I have been informed recently, by counsel, that there is no hope of settlement, and a decision by the court will be necessary. I mention this as a reason for the long delay in deciding the case.

This is a suit in equity to enforce a constructive trust in favor of the complainant in certain lands and mines, patented to the Mammoth Gold Mining Company, and, which were afterward conveyed to the defendant. The material allegations of the bill, which are established by the evidence, are as follows:

In the year 1865, a certain quartz ledge in Plumas county, known as the Mammoth ledge, with the appurtenances thereto, two thousand one hundred feet in length along the vein, was owned and possessed by James M. Thompson, and John B. McGee, who, severally, mortgaged their interests therein to John Conly & Company. On November 4, 1865, said Thompson and McGee, in company with others, located an extension of said Mammoth ledge of the length of two thousand feet, the title to nine-tenths of which has since passed by mesne conveyances to the complainant. After the location of said extension, in the year 1867, said Thompson and McGee made a survey of their said claim, and, also, made at the Marysville land office, an application for a patent for the whole four thousand one hundred feet of the ledge, including a tract of surface ground consisting of two hundred and fifty-two ninety-five one-hundredths acres, they at the time owning the whole, subject to said mortgages on two thousand one hundred feet. Notice of the application for a patent was duly published, in pursuance of the statute, for the required period, and no adverse claims were filed. This survey and application covered the two thousand one hundred feet mortgaged to Conly & Company, and the two thousand feet, subsequently, located by Thompson and McGee. The act of congress of 1866, having

been complied with, the right of Thompson and McGee, to receive a patent to the whole of said tract, became vested, as the result of said proceedings, upon payment of the purchase money required by law. The mortgages to Conley & Company mentioned, of the original two thousand one hundred feet, were, subsequently, foreclosed, and title to the mortgaged premises passed by sale, under the decree of foreclosure, to Conly & Co., and, by subsequent conveyances, to the Mammoth Gold Mining Company, which, at the time of the issue to it of the patent in question, had no other title, than that which passed under and by virtue of said mortgages and sale. The sale of the original Mammoth ledge of two thousand one hundred feet, with the appurtenances, and the foreclosure, having been made, said application for a patent was allowed to rest without further action until the year 1876. Conly, Tranor and Luther, constituting the firm of Conly & Co., having conveyed to the Mammoth Gold Mining Company, on June 9, 1870, the title to the two thousand one hundred feet, derived under the sale upon the foreclosure of their mortgages, seven years afterward, in 1877, executed another deed to said corporation, whereby they sold, remised and quit-claimed to said corporation all their right, title and interest to the whole four thousand one hundred feet. This deed contained this clause: "A deed having been executed by the first parties to the second party, dated June 9, 1870, conveying two thousand one hundred linear feet of the said Mammoth quartz claim, the intent of this indenture is to vest in said second party all the title of said first parties of, in and to the said Mammoth claim." But, neither at that time, nor at any other, did said grantors own any interest in any part of said claim, except the two thousand one hundred feet, purchased under their decree of foreclosure, and they could not convey any interest in the other two thousand feet. The Mammoth company had sold all of its stock to the Plumas Eureka company in the year 1871, and the latter company, which was beneficially owned, and controlled, by the corporation, defendant, had taken possession of said original Mammoth ledge or claim of two thousand one hundred feet,

and the ground adjacent thereto, and made improvements thereon; but at that time, took no possession of any other ground, made no efforts to do so, and expended nothing toward the working, or development of the said extension to said ledge, which was not included in any conveyance to them, but was still owned, and possessed by Thompson and his associates, who expended considerable money and labor, at various times, in endeavors to prospect the same, having, especially, in 1875, erected a cabin, and run a tunnel of some one hundred feet in length for the purpose of prospecting said extension, expending in the aggregate about one thousand dollars

In the fall of 1876, said Thompson proposed to the agents of the defendant, who were, also, at that time, the agents of the Mammoth company, and of the Plumas Eureka company, all of said corporations being at the time under the same control, that they should unite with him in perfecting the title to the whole of said four thousand one hundred feet of ledge, according to the original locations and survey, and to said tract of two hundred and fifty-two and ninety-five one-hundredths acres, by obtaining a patent therefor, under the application of Thompson and McGee already made, with an agreement for an equitable division thereof, according to their respective rights; but said agents declined the arrangement upon the plea that too much land had been included in the survey, and application; and that the company would not pay five dollars per acre for it. Thompson, who seems to have been the active man, whether intentionally or not, was thus put off his guard, and led to suppose, that the defendant's agents would have nothing to do with the survey, and application, of Thompson and McGee. Said agents of the defendant, however, soon after, in the early part of the following year, took measures to secure, secretly, in the name of the Mammoth company, a patent for the whole of said four thousand one hundred feet of ledge, and tract of surface ground, upon the said original survey, and application, of Thompson and McGee, without the permission of, or any notice to, Thompson or McGee, or any publication of their proceedings in any manner. They used

and prosecuted Thompson and McGee's survey and application, claiming to be successors in interest to the whole four thousand one hundred feet. In order to make it appear to the land department, that they the were successors in interest of Thompson and McGee, to the whole of the ground, they first obtained the said quit claim deed from Conly, Tranor and Luther, the purchasers under foreclosure, several years after their conveyance of the original two thousand one hundred feet, for the whole four thousand one hundred feet of ledge, under the name and style of the Mammoth ledge, said name having been applied to the whole four thousand one hundred feet by Thompson and McGee, in their application for a patent; whereas, in truth, said purchasers never had title, of any kind, to more than said two thousand one hundred feet included in the mortgages of Thompson and McGee, and purchased by Conly & Co., under the decree of foreclosure, as stated. This quit claim deed *was never recorded*, and all knowledge of its existence was withheld from Thompson and McGee, but was presented to the land office, as a part of the chain of title of the Mammoth company, which claimed the right to a patent, as the successor in interest in the entire tract. The Mammoth Gold Mining Company used and prosecuted the application of Thompson and McGee, and appropriated their survey, acts and work, by procuring a return of the field notes of the original survey, made for Thompson and McGee, by D. D. Brown, the deputy surveyor, which were approved by the surveyor general, for which return they paid Brown the sum of two hundred and fifty dollars, under the caution, and with the express understanding, that he should keep his action secret from Thompson and McGee, which he agreed to do, and did do until long after the patent was obtained, and the facts were, otherwise, discovered. The patent was obtained without the knowledge of Thompson and McGee, May 18, 1877, in the unusually short time of less than four months after the commencement of their proceedings on it, and it was recorded in the following June. In December, 1877, Thompson employed men to resume annual work on the extension, without any actual knowledge of the patent,

1885.]

Opinion of the Court—Sawyer, C. J.

or any suspicion of the action of said corporation, defendant, and its officers. On the twenty-first of December, 1877, the men were ordered from the premises by the superintendent of the Plumas Eureka company, under a notification—not that the Mammoth company had obtained a patent under the application and survey of Thompson and McGee, but that “they,” that is to say, the Plumas Eureka company, “had located the ground last summer, and had got a patent for it.” This was the first knowledge Thompson and McGee had of any adverse claim of title to the two thousand feet extension in question. Work was resumed in another place during the following January, but no work was done after January. In the fall of the following year, Thompson, having heard that a patent for the ground had been obtained in the name of the Mammoth company, but, still, in entire ignorance of the manner in which it had been obtained, began a series of inquiries into the matter. He first wrote in the month of September, 1878, to the Marysville land office, and, was informed, that the papers had been sent to Washington, and that a patent had been issued to the Mammoth company, but not through that office. Thinking it might have been returned through the Susanville land office, he then wrote to that office, but received assurance to the contrary, and was advised to write for information to the department at Washington. He then began a correspondence with the general land office, at Washington, which, finally, resulted in his obtaining an abstract from the general land office, which, after considerable delay, for which he was not responsible, was received and read by him about Christmas day of the year 1878, which was the first disclosure to him of the main facts constituting the conduct of the defendant. He shortly afterward consulted an attorney, who advised him that a legal fraud had been committed upon his rights.

Meanwhile the agents, who had been active participants in the procurement of the patent, had ceased their connection with the defendant, and a new agent had been appointed, who was absent from San Francisco, where Thompson resided, and where the defendant had its California office, the defendant being a foreign English corporation.

Under the advice of a mutual friend of Thompson, and of the English stockholders of the defendant, Thompson delayed action for the return of Mr. Coulter, the new agent of the defendant, indulging the hope that an adjustment of his claim might be effected without suit. Then began a series of negotiations, and correspondence, which continued without any definite result being reached, until, finally, an assignment having been made of the rights of Thompson and McGee to the plaintiff, this suit was instituted December 20, 1881, less than five years from the date of the patent, May 18, 1877; less than four years from the date of the ouster of December 21, 1877, and from the first knowledge by Thompson and McGee of the adverse claim set up by defendant; and less than three years from the actual discovery by Thompson and McGee, December 25, 1878, of the facts constituting the acts by means of which the patent was obtained.

The pleas of the defendant, besides a denial of the allegations of the bill, which allegations are satisfactorily proved, as above stated, are as follows:

1. *Bona fide* purchase by defendant for value without notice.
2. Abandonment and forfeiture by Thompson and McGee.
3. Adverse possession by the Mammoth company.
4. Statute of limitations.

It seems to me clear that the complainant has a sufficient cause against the defendant for the enforcement of a constructive trust, unless the respondent satisfactorily establishes one of its affirmative defenses.

The civil code, section 2224, declares that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or *other wrongful acts*, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Where one party, wrongfully, obtains the legal title to land, which, in equity and good conscience, belongs to another, whether he acts in good faith or otherwise, he will be charged in equity as a constructive trustee of the equitable owner.

1885.]

Opinion of the Court—Sawyer, C. J.

That, I think, is a doctrine established by the following cases: *Wilson v. Castro*, 31 Cal. 420; *Salmon v. Symonds*, 30 Cal. 301; *Bludworth v. Lake*, 33 Cal. 256; *Hardy v. Harbin*, 4 Sawy. 549, the latter being a decision of Mr. Justice Field on the circuit.

Under these authorities, unless defendant has satisfactorily established one of its affirmative defenses, complainant is entitled to a decree for a conveyance from the defendant of nine-tenths of the two thousand feet extension of the Mammoth quartz ledge, and of the proper proportion of the surface ground fronting upon and adjoining the extension included in the patent.

I think the defendant's plea for protection as a *bona fide* purchaser, for value, without notice, fails, under the proofs in the case. That plea involves two questions: 1, of payment of value; 2, of notice; both of which must be resolved in favor of the defendant in order to support the plea; but neither of which can be so resolved upon the proofs.

The burden is on the defendant to prove that some new and valuable consideration passed from it, in the purchase of the property, after the equity of Thompson and McGee had accrued. An acknowledgment of payment in a deed is no evidence of such payment as against the owner of a prior equity. (*Colton v. Seavey*, 22 Cal. 497; *Long v. Dollarhise*, 24 Cal. 218; *Galland v. Jackman*, 26 Cal. 80; *Boone v. Chiles*, 10 Pet. 177, 211.)

The testimony in this case fully shows that the whole beneficial ownership of the original Mammoth mine, as well as of the Plumas Eureka mine, had passed to the corporation defendant as early as 1872; therefore, that there could not, in reason, have been the payment of any new or valuable consideration to the Mammoth company by the Plumas Eureka company, or to the Plumas Eureka company by the defendant after the issue of the patent, which made the Mammoth company the constructive trustee of Thompson and McGee. There is no pretense of affirmative evidence, on the part of the defendant, that any purchase money passed upon the transfer of the patent to the Plumas Eureka company or to the defendant; but, on the contrary, the

defendant's own testimony proves that all of the expense of procuring said patent, in the name of the Mammoth company, was paid by the agents of the defendant, out of the proceeds of the Plumas Eureka mine, which was under the ownership and control of the defendant. This fully negatives the defense of *bona fide* purchase for value. But if there were no such evidence, there is nothing to show that value was, in fact, paid, and the defense would fail.

As regards the question of notice, the defense equally fails, for it is well settled that the knowledge of an agent, in respect to the subject-matter of his agency, is the knowledge of the principal; so that, in view of the fact that the agents of the Mammoth company were also agents of the Plumas Eureka company and agents of the corporation defendant, in respect to the same subject-matter, and performed all of their acts for the immediate benefit of the defendant, and at its expense, it is fully chargeable with knowledge of their acts, and with all equities arising therefrom. Indeed, their acts were the acts of the corporation, defendant. (*May v. Borel*, 12 Cal. 91; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 161; Story on Agency, sec. 140.)

The truth, doubtless, is, that these corporations, in substance and fact, were simply using the California corporation, through which to secure the title for the defendant itself, which was a London corporation, and there was a difficulty under the statute in the way of procuring title to itself directly from the United States. Hence it was so arranged that the patent should issue to the Mammoth company, which was an American corporation, and entitled to obtain a patent. It is not doubted that that corporation was used as an instrumentality for obtaining the title for the benefit of the defendant in this case. That defense, also, has clearly failed.

As to abandonment, there was manifestly none. Abandonment is a voluntary act, and there is no evidence to justify the court in finding that these parties abandoned their rights. (*Moon v. Rollins*, 36 Cal. 333; *Richardson v. McNulty*, 24 Cal. 345; *St. John v. Kidd*, 26 Cal. 271-2.)

It is not necessary to enlarge on that proposition.

It is said, also, that the claim was forfeited by those parties not working it, annually, as required by the statute. That is a matter, I take it, in this case, of not the slightest consequence. There was no evidence that the Mammoth company took up the claim, on the ground that it had been forfeited, or any other; and until some one did enter, the complainants, under the provisions of the statute, itself, could re-enter and resume work at any time before other rights attached in favor of subsequent locators. So the statute provides: *Jupiter M. Co. v. Bodie Con. M. Co.*, 7 Sawy. 98; *North Noonday M. Co. v. Orient M. Co.*, 6 Sawy. 301. At all events, these parties, had no title acquired in that way. They obtained the title through Thompson and McGee, upon their own survey and application. They went in and prosecuted the application of Thompson and McGee, as successors in interest to Thompson and McGee and not as adverse claimants on another independent title. The right which was good enough to enable defendant to obtain a patent for the benefit of the company, was certainly, good enough for Thompson and McGee to obtain a patent on for themselves. Their right to a patent was perfected under their survey, application, and publication of notice, there having been no adverse claims filed. The defendant is, surely, not in a position to say that Thompson and McGee had no title, because that was the very title which the corporation itself has got, and, the only title, on which it relied, and could have relied, to procure a patent, as to the extension. It does not lie in defendant's mouth, therefore, to say, that Thompson and McGee had forfeited their claim, and were not entitled to obtain this patent. Defendant, did, in fact, obtain it, and did secure the patent, through Thompson and McGee, and through them alone. Since the proofs have come in, on the argument, the respondent really does not make any stand on any of those propositions. They were substantially, treated, as abandoned, and were really not pressed, or relied on, as they could not well, honestly, have been.

Defendant's counsel now rely, mainly, on adverse posses-

sion, and the statute of limitations; and they endeavor to plead the statute of limitations. This is the defense, and only defense, earnestly pressed. This is an equity case, and the statute of limitations, as such, is not a defense in a court of equity of the United States. On the equity side of this court, the only defense is, laches in not pursuing the party's remedy for such time, and under such circumstances, as renders it inequitable to grant the desired relief—that the claim has become stale, so as to render it inequitable to enforce it. A court of equity, in analogy to the statute of limitations, usually, adopts the statute, as a limit to the time for enforcing the claim, unless there are other equitable circumstances, which are deemed sufficient to relieve the party claiming the right from the charge and consequence of laches. In this case defendant undertakes to set up the statute of limitations, as a statute of limitations, and, as such, a bar to the suit. It is claimed by complainant that the statute is insufficiently pleaded, the defense being alleged in the form authorized by the state code of civil procedure: "that the cause of suit is barred by section 343 of the code of civil procedure of the state of California." That is, simply, and, purely, a plea of the statute of limitations in the form which is recognized by the state practice, but which is not adopted in this court, as the code of civil procedure has no application on the equity side of the court. The defendant has, also, in another form, attempted to set up the facts, which show an adverse possession, for the period prescribed by the statute, in addition to pleading the statute of limitations, in the form prescribed by the code.

Staleness, or laches are not alleged in any other way than as thus indicated. But no formal plea of the statute of limitations or of the special facts is necessary, to raise the defense of laches, neglect, or acquiescence in a court of equity. These defenses are peculiar to courts of equity, and will be enforced in proper cases, wherein the facts appearing call for it, whether they arise upon the bill and pleadings, presented to the court, or upon the whole case, as disclosed by the evidence. The court will often take notice

1885.]

Opinion of the Court—Sawyer, C. J.

of it, even though the objection is not made by the parties: (*Pratt v. Cal. Mi. Co.*, 9 Sawy. 363, 365, and cases cited; *Badger v. Badger*, 2 Wall. 87; *Sullivan v. Portland*, etc., 94 U. S. 811.)

Regarding this defense as properly before the court, and adopting the statute of limitations, by analogy, under which provision of the statute does this case fall? In the first place, the complainant insists on the five year limit. This suit, it is insisted, is, in substance, and in fact, equivalent to an action to recover the premises, as the necessary effect will be to, ultimately, give possession of the premises to the complainant, and it is insisted that this being so, the same limit should be adopted, as in an action at law to recover the property, and a large number of authorities is cited to sustain that proposition. They are as follows: *Oakland v. Carpentier*, 13 Cal. 540; *Elmendorf v. Taylor*, 10 Wheaton, 152; *Miller's Heirs v. McIntyre*, 6 Peters, 61; *Manning v. Hayden*, 5 Sawy. 360, 379; *Love v. Watkins*, 40 Cal. 547, 570; *Coulson v. Walton*, 9 Peters, 62; *Harris v. King*, 16 Ark. 122; *Ware v. Van Blakkelen*, 1 Paige, 100; *Walker v. Walker*, 16 Serg. & R. 379; *Ferris v. Henderson*, 12 Pa. St. 54; *Paschall v. Hinderer*, 28 Ohio St. 568; *Perry v. Craig*, 3 Mis. 525; *McDowell v. Goldsmith*, 2 Md. Ch. 370; *Field v. Wilson*, 6 B. Mon. 479; *Murphy v. Blair*, 12 Ind. 184; *Weaver v. Froman*, 6 J. J. Marsh, 213; *Varwick v. Edwards*, 11 Paige, 289; *Baker v. Whiting*, 3 Sumner, 475; *Boone v. Chiles*, 10 Peters, 177.

But, under the view I take, it will not be necessary to decide whether that provision is applicable or not; for it is next claimed by the complainant, and, I think, correctly, that if the five years limit is not applicable, then the four years limitation is under the general claim that the limitation shall be four years in all cases not otherwise provided for. In response to this, the respondent asserts that the case falls under the provision, making the limitation three years, as being a suit "for relief on the ground of fraud." That the ground of the suit, is, fraud in obtaining the title. Suppose that to be so, the complainant replies, I did not discover the acts constituting the fraud, until within three

years after the perpetration of the fraud. In my judgment, the four years limitation applies, if the five years limitation does not. In support of the point made, that the bill is insufficient, and requires amendment, the respondent's counsel, inconsistently, in their brief, say, that the theory of the bill is *not fraud*, but it is well stated in the plaintiff's brief, page 8.

"Where one party, wrongfully, obtains the legal title to land, which in equity, and good conscience, belongs to another, *whether he acts in good faith or otherwise*, he will be charged in equity as a constructive trustee in favor of the equitable owner."

This, the respondent insists, is the theory of the bill, and such, I also think, is its theory. Respondent objected to certain testimony, which is claimed to show acts of fraud, if acts of fraud there are, on the ground that no fraud has been alleged, and, consequently, no evidence of fraud can be introduced, and no evidence as to the time when the fraud was discovered. The defendant having set up the statute of limitations in its answer, it is insisted that the complainant should have amended his bill, showing when the fraud was discovered. On looking at the bill, I do not find that the acts are charged as fraudulent. There is no charge of fraud in express terms. The acts may, nevertheless, appear to be fraudulent. The facts are stated to show in what manner the title was wrongfully obtained. It is not necessary for me to decide now, whether these acts would constitute a technical fraud, on which a bill could be maintained as such, or not. The acts are not alleged to be fraudulent, in express terms. The simple facts are stated upon the other theory indicated, without characterization, to show that the title had been, wrongfully, obtained. There was no relation of confidence, or trust between, these parties, and none alleged or claimed to exist. They were not dealing at all with each other. Defendant made no representations to the complainant on which he relied, unless a refusal to join in procuring the title, jointly, and a statement after the patent was procured, that the Plumas Eureka company had obtained the patent on a new location can be so regarded.

1885.]

Opinion of the Court—Sawyer, C. J.

When the first statement was made, defendants may not have intended to procure the title. But, the last, was after the wrong had been consummated, and evidently designed to mislead and prevent Thompson from ascertaining the real facts—to throw him off the proper line of investigation. No promise was made to, or procured from him. The respondent simply declined to go in with Thompson and obtain the title, and then divide according the several interests. But defendant, afterward, went, secretly, and, clandestinely, obtained the title to the whole for itself upon Thompson's and McGee's right and application. Undoubtedly, the title was secretly, surreptitiously, and, wrongfully, obtained. There being no relation of trusts or confidence between the parties, no false representation, no affirmative acts, known to Thompson and McGee, performed for the purpose of inducing them not to proceed with their own claim, and the defendant, having, simply, gone, and, quietly, secretly, and surreptitiously appropriated their application and claim, and obtained a patent, it may be, that their acts would not constitute a *technical fraud* within the law. I have not looked the question up, and I do not propose to decide it. But whether a technical fraud, or not, it, certainly, comes within the clause of the statute which I have just read that "one who gains a thing by '*other wrongful acts*' becomes an involuntary trustee." Here is, certainly, a wrongful act. The act of thus appropriating the property of another in a secret manner; without his knowledge, or consent, was, manifestly, and, unquestionably, tortious. Through these wrongful acts, the defendant obtained the complainant's title. If we concede that the bill might be maintained on the theory of fraud, that does not prevent complainant from maintaining his bill on the other ground of suit, as alleged—the wrongful acts of the character shown, by means of which the complainant's title was, surreptitiously, obtained. In my judgment, the case made upon the theory alleged in the bill, and established by the proof, falls within the provisions of the section, which says, that four years shall be the limitation—this cause of suit not being otherwise provided for. Such being the limitation, the four years

had not expired on December 25, 1877, when Thompson and McGee first learned of these wrongful acts, and, up to that time the wrongful proceedings were concealed by the party performing these tortious acts, and committing the injury. Up to that time, Thompson and McGee had no knowledge, that their rights had been invaded—that they had been thus deprived of their right to obtain a patent. Of course, if we consider the cause of action barred in four years, in equity, the parties could not be chargeable with neglect in enforcing their rights, until they knew they had been violated, and at the time of their ouster, the matter was for the first time brought to their knowledge. That was within four years of the commencement of this suit. They continued in possession, constructively, at least, and on December 21, 1877, were in the actual possession, and occupation, of their claim, by men working upon it. They, therefore, remained in possession of their mining claim until December 21, 1877, when their men were forbidden to work, and compelled to leave the ground, at a time when they were, actually in possession and at work. They were informed, at the time, that defendant claimed title under a patent to the Plumas Eureka company, obtained on a new location. These acts constituted an ouster, and it was less than four years before the commencement of the suit. Upon well settled principles of law, the statute does not begin to run against a *cestui que trust* in possession, until the date of his ouster therefrom, no matter whether the trust be express, or implied. (*Love v. Watkins*, 40 Cal. 569; *McCauley v. Harvey*, 49 Cal. 497; *Altschul v. Polack*, 55 Cal. 633.)

The defendant having, wrongfully, obtained the title of Thompson and McGee, in the manner stated, a trust resulted in their favor, and they were the *cestui que trust* of the two thousand feet extension, in possession of the trust property, and were not ousted until the twenty-first of December, 1877. I think, therefore, that their equities are not cut off by their laches in not pursuing their claim at an earlier date.

Again, in considering this defense, courts of equity will take all the circumstances into consideration. Thompson not, it is true, immediately commence his correspond-

1885.]

Opinion of the Court—Sawyer, C. J.

ence after notice of the adverse claim. He did, however, within a few months. Not many months after he obtained knowledge of the condition of things, through correspondence with the local land offices, and afterward with the general land office, he applied for, and, ultimately, obtained a transcript of the record from Washington, showing that the Mammoth company had obtained a patent on his and McGee's title; that there were false representations made to the land office. When ejected, Thompson, through his men, was informed that the Plumas Eureka company had obtained the title upon a new location of their own. These were false representations, undoubtedly, which tended to put the parties off the proper line of inquiry to find out what the facts were; and they would, naturally, have sought to ascertain what the Plumas Eureka, instead of the Mammoth company, had done. Within a very few months they commenced their inquiries. In December, they were ousted, and, as soon as the real facts were ascertained, they commenced negotiations with defendant for a recovery, or a settlement of their rights. Negotiations continued along for some considerable time. There was correspondence between the London office and the parties here, and there was reason to suppose a compromise might be effected. The negotiations seem to have been friendly, and not of a malicious, or, irritating, character. Thompson and McGee were negotiating, continually, all along pressing their claim. Finally, they informed the defendant that they must either come to some settlement, or they would be compelled to commence proceedings, to avoid the statute of limitations. They, evidently, intended to keep, and supposed they had kept, within the statute all the time, until the suit was commenced.

As I remarked in the opening, since the case was submitted for decision, over a year ago, negotiations have been pending, but have been fruitless. Those facts should be taken into consideration, I think, in determining the question, whether the rights of this complainant have been forfeited by their laches. They have indicated no intention to abandon their claim, but, on the contrary, at all times

manifested a purpose to insist upon, and maintain their rights. I am satisfied, if the five years limitation is not the clause applicable, the four years clause is, and that complainant is within the time, taking all the circumstances surrounding the transaction into consideration. The fact that they did not discover, or have any intimation, of the condition of things, until they were ousted in December, 1877, is highly important, and indicates the earliest time at which the statute could commence to run. Even if the three years limitation be applicable, the statute provides, that the time shall not begin to run "until the discovery of the *facts* constituting the fraud." In this case, the "*facts* constituting the fraud" were not actually discovered till within three years of the commencement of this suit. There was some little delay at first in pursuing such false clue to the facts, as had been given. But here Thompson and McGee were put upon the wrong line of investigation by false statements. They were also, subsequently, encouraged to hope for an amicable settlement by prolonged negotiations. If the suit must be regarded as seeking "relief on the ground of fraud," the facts disclosed are such as excuse delay, and under all circumstances, in my judgment, would render it inequitable, to apply the three years limitation. But, if applied, the time should commence to run at the time of the discovery of the facts constituting the fraud. There must, therefore, be a decree for the complainant in pursuance of the prayer of the bill.

There is one branch upon which I am not, at present, sufficiently advised, to enable me to make a proper decree—that in reference to the surface ground patented in connection with the mine.

There are two hundred and fifty odd acres of surface ground, very irregular in shape. There is a mill on some portion of it, erected by the defendant, since obtaining the patent. Whether that mill is on ground which the complainant is entitled to have, or not, I am not advised, in the present state of the record. Certainly, if it can be done, without wrong to the complainant, the defendant ought to be able to retain that mill. I do not know, from

1885.]

Opinion of the Court—Sawyer, C. J.

the testimony, where the mill is, in fact, located. The land is so irregular in shape, that it is not very clear where the lead runs, and where the twenty-one hundred feet end, and the other begins. The land is not in the form of a parallelogram along the line of the lode, within definite, fixed, straight lines, but there are all sorts of angles. Much of it is a long way outside of the lode, and I am not prepared to say what part of the land should pertain to the twenty-one hundred feet, and what part should go with the two thousand feet. If the parties cannot arrange that matter among themselves, before settling the decree, I shall be compelled to refer the matter to the master in order to ascertain and report the exact condition of these matters; the location of the mill; how it is situated, with relation to the two thousand feet, and in relation to the twenty-one hundred feet; how, in relation to a line of division drawn directly across the proper point, if there can be a line so drawn; and how much of the land is adjacent to the twenty-one hundred feet. These questions will have to be determined, unless the parties, themselves, can come to some understanding on the subject; and I shall have to refer the matter to the master to ascertain the facts. If necessary, counsel will have to draw an order for that purpose. There will be a decree for the complainant for the conveyance of the portion of the ledge to which he is entitled, and such portion of the surface land as may be ascertained to properly belong to the two thousand feet.

There is one other remark I wish to make. It is alleged that it was not averred in the bill, that this patent was obtained without notice of Thompson and McGee. There is no direct averment of that fact, but there is an averment that it was obtained without the permission of the plaintiff's grantors, and against their will, and it is, clearly, inferable, from the other allegations, that it was without notice, in fact. I think that the testimony objected to is admissible, under the allegations of the bill, as showing the circumstances under which the patent was wrongfully obtained, and I think that, of itself, would be sufficient, but it is a mere formal, technical objection. It is inferable,

Points decided.

[October,

from all the allegations of the bill, that it was without notice, and stated to be without permission. I am disposed to think it not necessary to amend the bill, but if complainants desire to amend, by alleging that the patent was obtained without notice, for greater safety, they have leave to do so. The proof must have been the same, with or without the allegation, and the defendant can, in no way, be injured by the amendment. Defendant can amend his bill to correspond with the proof that the patent was obtained without notice to Thompson and McGee. There is authority for this in the case of *Neale v. Neales*, 9 Wall. 1, 9.

In my judgment, it is not necessary, but if complainant desires to make an amendment, he can do so.

UNITED NICKEL COMPANY v. CALIFORNIA ELECTRICAL
WORKS.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 31, 1885.

1. PATENT No. 93,157 FOR NICKEL PLATING INFRINGED.—The defendant has infringed the first and fourth claims of Adams' patent No. 93,157 for nickel plating.
2. DR. BOETTGER'S PROCESS is not an anticipation of Adams' invention.
3. ADAMS' INVENTION CONSISTS OF A DISCOVERY of the conditions necessary to make nickel plating a practical art, and the process by which it is made available in the practical uses of life.
4. PERSUASIVE EVIDENCE OF NOVELTY.—Where the value of nickel plating had long been known, and a want of it long recognized in the practical affairs of life, without having been supplied, the fact, that, immediately, after a process for nickel plating had been brought to the attention of the world, it was extensively adopted in the arts, and went into widespread use, is, of itself, persuasive evidence of the novelty of the process.
5. ESTOPPEL BY LICENSE.—Where a patent contains several claims, each claim, substantially, covers a distinct invention, and if the patentee grants a license to use the invention covered by one of the claims, only, he is not estopped thereby from recovering for an infringement of the invention covered by another, and different claim, in the same patent, even though the infringement be accomplished by aid of the use of the invention to which the license extends. The license only protects the licensee in the use of the particular invention covered by the license.

Before SAWYER, Circuit Judge.

IN EQUITY. The opinion states the facts.

Messrs. Scrivner & Boone, for the complainant.

Messrs. Wright & Cormac and *Messrs. Wilson & Wilson*, for the defendant.

SAWYER, Circuit Judge, rendering an oral decision:

In this case it is objected on the part of the defendant, that the complainant fails to make out a case in three particulars:

First—"That the complainant is estopped from enforcing its right of action, if any such existed, by a course of conduct which amounted to an implied license to the defendant to pursue the work for which it has been sued."

Second—"That the complainant has not proved with reasonable certainty its allegation of infringement by defendant."

Third—"That the matter covered by the letters patent was not novel, or useful, at the time of its alleged invention."

I have carefully considered the testimony, and am satisfied, that the complainant has proved the infringement, as alleged; and that both the first and fourth claims have been infringed. I, therefore, decide that point against the defendant.

Third, with reference to novelty and usefulness: That the invention is useful does not admit of doubt. As to its novelty, that is a question, that has been litigated by the ablest patent lawyers, before the most experienced judges in patent laws, in the Union, for the last fifteen years, in case after case. In every instance, so far brought to my attention, the patent has been sustained upon the point of novelty. Of course, those decisions are not binding on this court as to the facts, in this case, but they indicate the views of other courts upon similar states of facts, which have been, repeatedly, fully presented and considered. This case, however, must be decided upon the testimony introduced here. There is an effort, and the only substantial effort, made to defeat the patent upon the question of novelty, to show that one Dr. Boettger, somewhere before 1843,

made the invention, and described how nickel plating could be done, and that his process was described in a book published as early as 1843, and in subsequent editions, though no witness had seen the book, or knew of its date except from hearsay, and the date inscribed on the book, it being a German publication, until some time in 1869, and the date of this patent is August 4, 1869. Some experiments have been made by scientific gentlemen, to show that it is practicable to nickel plate by the use of Dr. Boettger's solution, and proceeding in accordance with his directions. Dr. Boettger's process could not well have been overlooked, in the trial of former cases, considering the character of the publication in which it was found, and the number and ability of the counsel, and of the judges, who have constantly dealt with the question of novelty, although I see no direct allusion to it in any of the cases, except that of *United Nickel Co. v. Melchoir*, at Chicago, 17 F. R. 340, wherein it was before the court, and referred to by the judge hearing the case.

In that case, Judge Blodgett referred to the testimony introduced on the issue of novelty, additional to that which appeared to have been before presented to the courts, and referred to Boettger's solution, but said nothing had been presented that satisfied his mind of the want of novelty in Adams' invention. In this connection, he said: "Much testimony has been put into the record in this case bearing upon the question of novelty of these two patents. But a careful examination of the proof satisfies me, that all this testimony, which is worthy of attention, has been considered by the courts before whom these patents have been, heretofore, adjudicated, and that no new light is shed by the testimony upon the question of novelty. The same ground seems to have been gone over in the former cases, that is shown in this, and the devices held to be novel and patentable." This passage applies with even greater force to the present case.

Other scientific works, not introduced in this case, German and English, were referred to in the numerous cases heretofore tried, some in one and some in the others, but in all of

1885.]

Opinion of the Court—Sawyer, C. J.

the cases, the novelty of the invention was affirmed. When we consider the number, experience and ability of the counsel engaged in the numerous cases, heretofore, tried, and the number and experience of the judges, including nearly all the judges of the circuit courts, having the most experience in patent cases, including Mr. Justice Blatchford, of the supreme court, it is, scarcely, to be supposed, that Dr. Boettger's description of a process has been overlooked, or has not been duly considered, and ruled upon.

Whatever the truth may be with reference to Dr. Boettger's experiments, and the work referred to, they seem to have been simply scientific experiments in the laboratory, in which he ascertained that by preparing, and using the material in the way he pointed out, nickel could be deposited, and nickel plating, on a small scale, be accomplished. That is as far as he went. He did not reduce it to a practical art. It does not appear, that he ascertained all the conditions, necessary to success, but simply that the particular solution would accomplish the object, as a scientific experiment. This discovery, was not employed or used in the general affairs of life, and down to 1869, there was no practical work of that kind, so far as the evidence shows—that is to say, it had not become a practical art. It was not applied to the practical and commercial uses of life. And Boettger's method is not even now used. All appear to be using Adams' invention. As Judge Blatchford said, Dr. Adams appears to have first discovered the conditions necessary to practical nickel plating, and to have introduced his discovery into the arts, and applied it to the practical purposes of life. He ascertained the conditions, which were necessary, and reduced nickel plating to a practical, useful art. The value of nickel plating was known before, and it had often been sought to render it practically available, but the efforts made have never been successful, until Dr. Adams introduced it to the knowledge of the world. The strongest light, in which the evidence can be put, against the novelty, only shows that there is a doubt, whether nickel plating was reduced, by Dr. Boettger, to a practical art, in such a way as to avoid the patent. The

patent is *prima facie* evidence of its novelty, and that must be overthrown. There was a great known want—a valuable use and demand for nickel plating in the affairs of practical life. Its value was known, and parties were seeking for some mode of making it available for the valuable uses to which it was applicable. Notwithstanding this recognized want, Boettger's process was not in use in practical affairs, prior to 1869. Immediately after the discovery, by Dr. Adams, and the promulgation of his patent, in that year, the art became known and largely practiced, and the product went into immediate, and extensive use. Manufacturing were established all over the country for nickel plating. All kinds of implements that go into the daily uses of practical life, were treated by his process. One witness says, it would be less difficult to mention things that were not nickel plated, than those that were. As soon as the practical question was solved, the product went immediately into extensive use, and that use increased from day to day from that time on. This fact constitutes convincing evidence that something was wanting in the processes previously known, and is very persuasive evidence of the novelty of Adams' invention. In view of all the circumstances, it is amply sufficient to establish its novelty, and the testimony in this case, like that in the other case cited, is insufficient to rebut that proposition. I, therefore, hold that the novelty is established.

In my comments on the next proposition, it will further appear to what extent this invention has gone into use, and no doubt can remain as to its usefulness.

That proposition is, that the invention has been used under such circumstances as to estop the complainant from asserting its right under the patent. The circumstances mainly relied on, are, that this solution which Dr. Adams used in his process of electro plating, has been sold by his authority by the firm of Condit, Hanson & Van Winkle, in New Jersey, with descriptions given of the mode of using, and of all the conditions essential to successful nickel plating; that it was sold, not only by this firm, but it was sold generally, by other firms. With reference to this fact, it is

1885. J

Opinion of the Court—Sawyer, C. J.

alleged, that the firm of Condit, Hanson & Van Winkle has sent out pamphlets, giving descriptions of the whole process, and advertising the solution and preparation under the patent, for sale, for the purpose of nickel plating, without indicating that it was patented. Several pamphlets were introduced by the defendant, to show that fact, some issued by the *old* firm of Hanson & Van Winkle, dated as far back as 1876. There is no notice in the earlier pamphlets of the patent, but, at that time, these parties were not agents of the complainant, but, were infringers themselves, and they then had suits for infringement, pending against them. In 1881, they issued a new pamphlet (defendant's Exhibit 8) and on the second page of the pamphlet we find this statement :

“After the decisions of Judge Blatchford, in the suits of the United Nickel Company against *a large number of manufacturers in New York*, in which the nickel plating patents were again sustained, and subsequent injunctions granted against the Gore and other solutions, the American Manufacturers Association, *composed of some forty of the largest manufacturers in the country*, decided, in a body, to abandon the suits and take out licenses ; their action has been followed by many others throughout the country, *the licenses now numbering about three hundred*. The result has been so far, to advance the price of nickel plated goods, notably saddlery, hardware, stoves, etc.”

Then they go on, under the date of June 1, 1878, and publish this :

“The United Nickel Company has this day granted to Condit, Hanson & Van Winkle of Newark, N. J., the exclusive license for manufacturing cast nickel anodes, under their various patents, [the use of certain anodes is one of the claims in this patent, but not claimed to be violated, but complainant has other patents covering anodes] requiring from them a standard of quality that will insure the best results in the hands of our licensees, and at reasonable prices, to be governed by the market price of pure nickel.

“All nickel anodes manufactured by them hereafter will have the name of the United Nickel Company, and date of

patents, upon them; and we therefore notify all parties against manufacturing, selling, or using cast nickel anodes, not made under our license."

This is in the edition published in 1881. That agreement was made in June, 1878. It shows, that these patents having been contested and always sustained, all the leading nickle plating establishments then infringing combined together to abandon the infringement and take out licenses. This pamphlet is express notice, sent to purchasers with the goods purchased, of the condition of this patent; but that is not all. The manufacture and sale of this solution proposed under the patent, do not authorize the nickel plating covered by the first and fourth claims. The first and fourth claims of the patent do not cover the process of manufacturing the solutions necessary for nickle plating. That is embraced as a distinct invention under the third claim—the methods described for preparing the solution of the double sulphate of nickel and ammonia. The third claim of the patent is as follows: "The methods herein described for preparing the solution of the double sulphate of nickle and ammonia and the double chloride of nickel and ammonium." The third claim of the patent, then, covers this process of making the proper solution to be used. Complainant does not claim that the third claim is infringed. Desiring, of course, to make the patent a success, complainant provides for a recognized place, where the solution, properly manufactured according to the patent in such manner as would make the nickel plating a complete success, can be obtained. Hence, Condit, Hanson & Van Winkle are authorized to sell that solution. These parties only bought the solution. Had they used it without having bought it from a licensed party, they would have infringed the *third* claim of the patent, as well as the *first* and *fourth*. The infringement of the third claim of the patent has nothing to do with the claims now infringed. Having bought the solution from authorized parties, there was no infringement of the third claim. But this fact does not affect any other claims of the patent. The fact that they purchased from authorized agents this solution, which enables them to nickel plate, does not, inference

tially, or otherwise, authorize them to use it in nickel plating without obtaining a license to use the invention covered by the other claims. They must, also, get a license to use the inventions covered by the other claims, or they cannot use this without being liable as infringers. Each claim is, in effect, a separate and distinct patent, and the right to use one patent does not carry with it the right to use the others, without a further license. The first claim which is infringed is as follows: "The electro-desposition of nickel by means of a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, prepared and used in such a manner as to be free from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction." That is what the first claim is. It is plating by means of the described solution, and the conditions under which plating can be done is, that the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, must be prepared in such a manner as "to be free from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction." Those are the essential conditions, which Adams discovered, and it does not appear that Dr. Boettger ever discovered that those were necessary conditions. It does not appear that he ever discovered that the absence of all these elements is essential to successful nickel plating, for commercial purposes. This is the first claim. The defendant has infringed it. The defendant uses Adams' preparation to accomplish his purposes. That preparation is covered by the third claim. The first is a claim in addition to that. The selling of the solution does not authorize, inferentially, or otherwise, the use of it for the purpose of nickel plating, whatever else it may be used for, without, also, procuring a license to nickel plate under the first and fourth claims, which are separate inventions.

Again, the defendant says, that at the time Adams discovered the necessary conditions for nickel plating and brought them before the public, the nickel of commerce was impure, and it was necessary to prepare it. Now, it is said, the nickel of commerce is pure, and any one can buy it, and

the nickel plating can be accomplished by using it in the form in which it is found without going through the process preparing the solution as described by Adams, and that there is, consequently, no infringement by using now the nickel of commerce; that a more nearly pure article of nickel has been discovered, or, at all events, the nickel of commerce is in such a condition that it can be successfully used now in a solution not prepared in all respects under Dr. Adams' process. But consider this to be so, still all the conditions in the aggregate appear to be the same. If that be so, it only shows that commerce demands an article of nickel free from some of the deleterious elements, and, which is in a proper condition to be used in solution without otherwise previously eliminating them, hence, those preparations at this day for commerce. But even on that hypothesis, Dr. Adams still discovered the conditions necessary to successful nickel plating, and the demands of commerce are, that the articles shall be in such a state as to conform to the conditions necessary to use in that art; that is to say, the nickel must be made in some way to conform to the conditions when in solution which he describes as necessary, in order to make nickel plating a success in the practical arts of life. The demands of commerce, therefore, on that hypothesis, are such, that the necessary conditions must exist; either in the preparation of the solution, or in the prior preparation of the nickel used which enters into the solution, but the use of the conditions of nickel plating is none the less a violation of the patent, because the nickel is put in a condition by which it can be introduced into the solution with less trouble and expense. All this preparation is made subsequently to the discovery of the conditions on which practical nickel plating can be successfully carried on, and, therefore, cannot avail, to avoid a violation of the patent. But the defendant did use complainant's solution in its works, and used his invention, and not that of any prior discoverer. I think complainant is not estopped, and that the first and fourth claims are infringed.

The fourth claim is:

"The electro plating of metals with a coating of com-

1885.]

Opinion of the Court—Deady, J.

pact, coherent, tenacious, flexible, nickel of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact."

Let there be a decree for complainant, as to the first, and fourth claims, and a reference to the master to ascertain the profits and damages sustained.

L. B. SEELEY v. S. G. REED.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 2, 1885.

1. **SUIT TO RESCIND CONTRACT ON THE GROUND OF FRAUD.**—A court of equity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a material matter by such representation or conduct, to his injury or prejudice.
2. **IDEM.**—But when the facts are known to both parties and each acts on his own judgment, the court will not rescind the contract because it turns out that they or either of them were mistaken as to the legal effect of the facts or the rights or obligations of the parties thereunder; and particularly when such mistake can in no way injuriously affect the right of the party complaining, under the contract, or prevent him from obtaining and receiving all the benefit contemplated by it and to which he is entitled under it.

Before DEADY, District Judge.

Mr. Thomas Strong, for the plaintiff.

Mr. George H. Williams and *Mr. George B. Durham*, for the defendant.

DEADY, J. This suit is brought by the plaintiff, a citizen of Ohio, against the defendant, a citizen of Oregon, to have a contract entered into by the parties on March 27, 1884, canceled, and a certain promissory note and certificate of stock then delivered by Seeley to Reed, in pursuance thereof, returned to him. The bill was filed July 29, 1884.

The case was heard and submitted on the bill, answer and replication and the testimony taken by the plaintiff. The execution of the contract in question is admitted. At the

date of it, the parties were in New York and the plaintiff was a stockholder in the Oregon Iron and Steel Company, a corporation formed under the laws of Oregon, of which the defendant was then the president. It begins with a recital, that Reed is willing "to advance or loan" said company, including the amount theretofore "loaned or advanced" to it, the sum of one hundred and fifty thousand dollars; that Seeley "is willing and desires to obtain an interest of fifty thousand dollars" in said loan, and to that end has given his note for that sum to Reed, payable in two years thereafter, with interest at seven per centum per annum, and has "delivered as collateral security for said note and the interest thereon, three hundred and sixty one-shares of the capital stock, full paid," of said company; in consideration whereof Reed agrees that on the payment of said note, to redeliver to Seeley said shares of stock, "together with one-third of such bonds, stocks, notes or other securities," as he may obtain from said company, "in consideration of his said advance of one hundred and fifty thousand dollars;" and Seeley authorizes Reed in default of payment of said note to "sell or dispose" of said three hundred and sixty-one shares of stock and the said one-third of the securities received from said company, subject, however, to the stipulation that if the proceeds of such sale or disposition are not sufficient to pay said note at the maturity thereof, Seeley shall not be further liable thereon, but the same shall be delivered to him; and in consideration of the premises, Seeley also agrees, if requested by said company, to act as its general manager for the period of two years, at a salary not exceeding three thousand dollars per annum.

The bill alleges that on August 22, 1883, the capital stock of the company was reduced from three million to one million five hundred thousand, and the number of shares thereof reduced correspondingly, but Seeley's certificate number ten, for seven hundred and twenty-two shares, was not surrendered and reduced to three hundred and sixty-one shares, of which it is, and in making said contract, was considered the equivalent; that at the date of the contract the company was financially embarrassed, and the same was

1885.]

Opinion of the Court—Deady, J.

executed solely for the purpose of aiding it in raising funds; that Seely had not been in Oregon for a long time, and got "almost all" his information concerning the condition of the company from Reed, who "falsely and fraudulently represented" to him that he had advanced over one hundred thousand dollars to the company, when in fact he was then and still is largely indebted thereto; that said certificate was delivered to Reed in trust until he should make the loan to the company and obtain the securities therefor, when it was to be held as collateral security for the payment of the note, which latter was delivered without any consideration except the contract; that shortly after Seeley arrived in Oregon, on and after July 10, 1884, he first examined the records of the company and discovered that Reed and his associates "fraudulently contriving" "to wreck" said company, had "fraudulently and illegally appropriated and converted to their own use over four hundred thousand dollars, in money and properties, of its assets;" whereupon he commenced a suit in this court against Reed and others, comprising the firm of Smith Bros. & Watson, and W. S. Ladd and others, comprising the firm of Ladd & Tilton, and E. W. Crichton, C. R. Donahue and H. A. Elliott, to compel the return to the company of said assets, which suit, the bill therein being held multifarious, was on November 12th dismissed, when he commenced two suits in this court for the same matters—the one against a portion of said parties and the other against them all—which suits are still pending, and Seeley's right to maintain them depends on his being a stockholder of said company; that on July —, 1884, and divers days thereafter, Seeley demanded of Reed to return said certificate and note or perform his agreement and advance one hundred and fifty thousand dollars to the company, the former which he refused and still refuses to do, and the latter of which he is now unable to do, and "is fraudulently attempting to make said company insolvent and financially embarrassed and unable to pay its debts; that said three hundred and sixty-one shares of stock have not been transferred on the books of the company and the legal title thereto is still in Seeley, but that on

July 16, 1884, and since, Reed, to prevent Seeley from maintaining said suits and to enable him the better to carry out his scheme of wrecking said company, did fill up said blank transfer and power and attempt to have said shares of stock transferred to himself, and unless restrained will yet do so, for he and his associates have the control of said company," to the "irreparable injury" of the plaintiff and said company, and "to the manifest and irreparable subversion of justice in the premises."

The defendant, by his answer, denies positively and specifically every charge in the bill of false, fraudulent or illegal purpose, representation or conduct, or that he is or ever was indebted to the company, and alleges that at and prior to the date of said contract Seeley and himself were in New York conferring together concerning the financial troubles of the company with a view to its relief, at which time the latter knew that the defendant had advanced in the neighborhood of one hundred thousand dollars to the company and was fully advised of the proceedings of the directors; that Seeley then knew the financial condition of the company otherwise than from the defendant, and was in close relationship and correspondence with E. W. Crichton, the secretary and one of the directors of the company; that Seeley then and there proposed that if the defendant would buy of him sixty-two and one-half of the reduced shares of the company's stock, at its par value—six thousand and two hundred and fifty dollars—and would enter into said contract and take his non-negotiable note and said three hundred and sixty-one shares of stock as collateral security for its payment, he would come out to Oregon and attend to the business of said company and relieve the defendant from further anxiety about the same; that Seeley, who was much better acquainted with said business than the defendant, represented to him that if this arrangement was made he could put the business of the company on a satisfactory footing, whereupon the defendant accepted the same and signed said agreement, and at the same time and as a part of the same transaction, and to accommodate Seeley, he purchased from him said sixty-two and one-half

1885.]

Opinion of the Court—Deady, J.

shares of stock and then and there paid for them, by cash, four thousand and ninety dollars, and by the surrender of Seeley's note of May 21, 1883, for two thousand dollars, with interest from date at eight per centum, making in all six thousand two hundred and fifty dollars; that thereupon Seeley delivered to defendant certificate number twenty-two for one hundred and twenty-five shares of stock, with an endorsement thereon dated March 27, 1884, signed by him, and to the effect that it was to be surrendered and a new certificate issue in its place for half the amount, together with a power of attorney for the transfer of the same, and on April 8, 1884, delivered to the defendant certificate number ten, for seven hundred and twenty-two shares of the company's stock, mentioned as three hundred and sixty-one shares of said stock in said contract, with a like power of attorney and endorsement thereon; that defendant did not want said sixty-two and one-half shares of stock, nor were they worth the price paid for them, and the chief inducement for their purchase was to get Seeley to come out to Oregon and take charge of the company's business, for which reason, at the latter's urgent request, he also, on April 10th, advanced him five hundred dollars to defray his expenses to Oregon; that soon after Seeley came to Oregon, arriving in Portland on April 17th, for the purpose as defendant understood of carrying out said contract, but instead of so doing returned to New York about June 10th, and proposed to the defendant, that he should acquire the property of the company and convey one-fourth thereof to himself, one-sixth to Crichton and one-twelfth to Donahue, with the management of the whole, for which Seeley was to give his note for one hundred and fifty thousand dollars, payable in thirty years, with interest at six per centum per annum, and said Crichton and Donahue were to give similar notes for one hundred thousand dollars and fifty thousand dollars respectively, to be secured by a mortgage on the property, and that this proposition was accompanied with a threat that unless it was accepted Seeley would sue the defendant, exhibiting at the same time an opinion prepared by his counsel in which it was said—"in the hands of a

Opinion of the Court—Deady, J.

[November,

skillful lawyer their mistakes (referring to the directors of the company) however innocent they might have been, would appear very suspicious, and the wreck of this fine property appear a premeditated affair"—which proposition the defendant declined and insisted on the arrangement of March 27, 1884; that about June 16th the defendant, in pursuance of said contract, advanced the company thirty thousand dollars; that defendant arrived in Portland about June 30th, and on July 7th proposed to the company to make it an advance sufficient with that already advanced to make the sum of one hundred and fifty thousand dollars, which proposition, by the votes of Crichton and Donahue, who were then in the board of directors, was laid on the table, but was repeated on September 23d and laid on the table until October 21st, when it was duly accepted, and thereafter, on October 23d, the defendant in pursuance thereof advanced and loaned to the company twenty thousand eight hundred and forty-seven dollars and ninety-one cents, which with his former loans and advances made the sum of one hundred and fifty thousand dollars; and that the blank assignments and power given to the defendant by Seeley, with the certificate number ten was filled up by the former in the due course of business before the commencement of the suit by Seeley against Reed and others, and according to the understanding with Seeley at the date of the contract, but the secretary of the company, Crichton, acting in collusion with Seeley, illegally refused to make the transfer to the defendant on the books of the company.

The defendant also in his answer offers to rescind the contract and return the note and both the stock certificates if Seeley will return him the money paid on number twenty-two—six thousand two hundred and fifty dollars—which he avers was a part of the consideration of the contract.

The testimony taken by the plaintiff was quite voluminous and covers a wide range. By far the greater portion of it relates to matters mooted in the other suits of his, pending in this court, and have little or no application or weight in this.

The answer of the defendant is under oath, and so far as it

1885.]

Opinion of the Court—Deady, J.

is responsive to the bill, it is taken as true until the contrary is clearly established by the testimony of at least two witnesses, or one witness and clear corroborating circumstances. (*Hough v. Richardson*, 3 Story, 692; Story's E. P. § 875 a; *Tobey v. Leonard's*, 10 Wall. 430.)

The only ground on which the court can give the relief prayed for in this bill, is that by the fraudulent representation or conduct of the defendant in or about a matter material to the subject of this contract, the plaintiff was misled to his injury. (Story's E. J., §§ 201-2, 695; 2 Pom. E. J., § 910; *Hough v. Richardson*, 3 Story, 690; *Smith v. Richards*, 13 Pet. 36.)

The allegations of fraud are vague and indefinite. They may be condensed into two statements. One, that the defendant, at the time of making the contract, told the plaintiff that the company owed him about one hundred thousand dollars, when in fact he was indebted to it. The other that sometime before that date, the defendant and his associates, without saying who they are, had fraudulently appropriated to their own use, four hundred thousand dollars of the assets of the company.

The only evidence in support of the first allegation is the testimony of the plaintiff, which is contradicted by the answer of the defendant.

Looking into the evidence to see on what this question of indebtedness turns, I find that the company was organized in April, 1882, with eighteen thousand shares of stock, of the par value of one hundred dollars each, which was subscribed by W. S. Ladd, W. M. Ladd, and E. W. Crichton, the latter taking one thousand seven hundred and seventy, and the others one hundred and fifty shares each; that in the fall of 1882 the company purchased the property of the Oswego iron works, valued at six hundred thousand dollars, for twelve thousand shares of its stock, valued at fifty cents on the dollar, and issued the same to S. G. Reed, H. Villard and D. O. Mills, three thousand shares each, and to W. S. Ladd, L. B. Seeley, C. P. Donahue and E. W. Crichton, seven hundred and fifty shares each; that soon after the remaining six thousand shares were issued to Crichton as paid

Opinion of the Court—Deady, J.

[November,

up stock, to be disposed of as such, at fifty cents on the dollar, for the purpose of purchasing machinery for the company, which stock Crichton soon after surrendered, and the same was reissued to the defendant for the same purpose, and that he disposed of one-half of said shares for the sum of one hundred and fifty thousand dollars, for which he accounted to the company, but being unable to dispose of the remainder, he returned them to the company, when the directors at a meeting held on September 24, 1883, accepted the same, and returned his receipt therefor, and at the same time in pursuance of a vote of the stock holders, at a meeting thereof, held on the same day, the directors reduced the stock of the company one-half, and ordered the unsold shares returned by the defendant canceled; and that the defendant, prior to the making of said contract, had in fact advanced to the company near about one hundred thousand dollars.

It also appears from the testimony of the plaintiff, as well as otherwise, that all these matters were known to him at and before the making of the contract, and that he and the defendant acted on the assumption that such were the facts, without either relying on the other for his information; but afterwards, and before commencing this suit, the plaintiff, on the advice of counsel probably, came to the conclusion that the legal effect of the facts was and is, that the defendant was a subscriber for said six thousand shares of stock, and not the mere agent of the company for its disposal, and therefore was still indebted thereon to the company in the sum of one hundred and fifty thousand dollars, from which the directors had no power or right to release him; and that deducting his advance from this sum, he remained and was indebted to the company in the sum of fifty thousand dollars. Now, admitting that the plaintiff's present view of the defendant's liability in regard to this stock is the correct one, there is no ground for saying that the plaintiff was misled in this matter by the defendant. The plaintiff knew as well as the defendant that the directors had accepted the return by the latter of the three thousand shares of this stock, and the facts relating to it, and could

1885.]

Opinion of the Court—Dedy, J.

and did judge for himself as to the effect thereof. At least, the defendant does not appear to have been either his informer or adviser in the premises, while he does appear to have been in close correspondence with his friend, E. W. Crichton, who has been a director and superintendent of the company since its formation, and the secretary thereof since December 1, 1883.

But admitting that the defendant was indebted to the company in the sum of fifty thousand dollars instead of the company being indebted to him in the sum of one hundred thousand dollars, and that the plaintiff was ignorant of that fact, the knowledge of it would not have prevented him from entering into this contract, but on the contrary, would have been an additional inducement to do so. In this matter the defendant appears to have sought and obtained an opportunity to take an interest with the defendant in a loan to the company, not simply for the good of the latter, so far as it appears, but his own good, as well. The state of the account between the company and the defendant was a matter of no importance in the premises to the plaintiff, except as it indicated the solvency or not of the former, and its ability to repay the loan with interest. So that the defendant being abundantly able to pay this supposed indebtedness to the company, the fact of its existence, instead of operating as a fraud on the plaintiff, as a party to this contract, was an advantage to him, both as a creditor and a stockholder, to the extent, that it increased the company's assets.

As to the other charge, the material facts appear to be that in the spring of 1883, negotiations were opened between the company and the firm of Smith Bros. & Watson, of this city, for the purchase of their foundry property, that resulted in a proposition by the latter to sell the same, at a valuation of two hundred and twenty-five thousand dollars for four thousand five hundred shares of the company's stock, valued at fifty cents on the dollar, and at a stockholders' meeting, held on March 20, 1883, it was voted to authorize the directors to make the purchase, and upon the receipt of proper deeds and bills of sale of said property, to issue to Smith Bros. & Watson, four thousand five hundred

Opinion of the Court—Deady, J.

[November,

shares of paid-up stock of the company; but the directors took no action in the premises, nor did the former ever make any conveyance or transfer of their property to the company. Subsequently, they proposed to withdraw their proposition of sale, and at a meeting of the directors, held on September 24, 1883, their request was unanimously complied with.

In the meantime, between the making of the proposition and the withdrawal of the same, the two concerns maintained intimate business relations, but were carried on separately and without any consolidation. In this time Smith Bros. & Watson put up the large iron transfer or ferry boat for the Northern Pacific, to be used on the Columbia river, at Kalama, by which it is said they cleared one hundred thousand dollars, and did work for the company for which they were allowed, and paid on settlement, forty thousand dollars.

The charge that the defendant and his "associates," meaning, I suppose, his co-directors, W. M. Ladd, E. W. Crichton, C. R. Donahue and F. C. Smith, the persons constituting the board when Smith Bros. & Watson were allowed to withdraw, appropriated four hundred thousand dollars of the assets of the company to their own use, is based on these facts.

In other words, it is boldly assumed that the company not only lost the value of the foundry property, the alleged profits on the transfer boat construction and the money paid for work done for it, in all three hundred and sixty-five thousand dollars, by the illegal action of the defendant and his co-directors on September 24th, but that these parties thereby wrongfully appropriated the same to their own use.

To begin with, the company could not have lost anything by not getting the foundry property, unless it was worth more than it was to give for it, which does not appear, and that it could possibly have lost two hundred and twenty-five thousand dollars thereby, or any considerable portion of that sum, is under the circumstances simply absurd.

There is no proof of the profits made on the construction of the ferry boat, but it is highly probable that there were

1885.]

Opinion of the Court—Deady, J.

profits, and it may be admitted, for the purpose of this question, that they reached the figure stated—one hundred thousand dollars. The forty thousand dollars paid for work done could not have been lost to the company, unless the transaction was fraudulent or fictitious, which does not appear, but rather the contrary.

But admitting that there is no ground for the general allegation that the defendant and his associates converted these sums to their own use, it is alleged that the defendant was at the date of the transaction complained of, a secret partner in the firm of Smith Bros. & Watson, and that whatever the company lost by it, he, as a member of that firm, got a share of. Granting for the time being, that the defendant was a member of this firm, it does not follow that he was a gainer by any transaction between it and the company, even if the latter was the loser thereby. Taking the plaintiff's contention for true, the defendant was one of five persons constituting the firm of Smith Bros. & Watson, while it appears from the evidence that he was, and is the owner of one-fifth of the stock of the company, and was therefore liable to lose on the one hand as much as he could gain on the other.

And as to the question of whether the defendant and his co-directors acted wrongfully, or even improvidently, in consenting to the withdrawal of Smith Bros. & Watson's proposition, it must be remembered that it was done under the advice of eminent counsel, upon the very plausible ground, to say the least of it, that they could not be held thereto—the same not having been accepted by the directors, and the stockholders having no power under the corporation act to transact any such business.

But however this may be, it is a sufficient answer to this charge, and to any claim the plaintiff may make on the facts involved in it, that he knew all about these matters, at and before he executed the contract, and was in no way misinformed or misled by the defendant concerning them.

With full knowledge of the facts, he then appears to have regarded the transaction as legal and honest, and if he has since come to a different conclusion, or been advised that

the company has a valid claim against the defendant and his "associates" for four hundred thousand dollars on this account, what possible cause is that for canceling a contract for an interest in a loan to the company?

When the plaintiff executed this contract, he must have supposed the company was more or less financially embarrassed, and yet he was not only willing but desirous of taking a considerable interest in a large loan to it; but now that he finds it has a valid claim, of which he was then ignorant, against solvent parties for four hundred thousand dollars, a sum greatly beyond the company's indebtedness, he wishes to be released from his engagement upon the plea that this claim arises out of the previous misconduct of the defendant and his associates, which made this loan necessary.

Neither is the plaintiff entitled to have this contract rescinded by reason of anything that has happened or been omitted since it was executed. The defendant did not undertake absolutely to make this loan to the company or to do so within any specific time; and in any event, the consent of the company must first be obtained, and the one hundred thousand dollars already advanced was to be considered a part of it. Doubtless, he was bound to make the loan in a reasonable time, the circumstances considered, or return the plaintiff his note and certificate of stock. But the loan has been made in pursuance of the contract, and as soon thereafter as the company would accept it, and give the plaintiff the proper acknowledgment thereof and obligation to repay it.

And now, whether as a result of this transaction the plaintiff is or may become a non-stockholder in the company and therefore unable to maintain any suit for relief against these transactions, if wrongful and injurious to the stockholders, is altogether immaterial, so far as this case is concerned. An otherwise valid contract cannot be canceled on any such irrelevant ground or apprehension as this. If the plaintiff, by pledging his stock to the defendant as collateral security, with a blank assignment and power of transfer, has deprived himself of the right and privilege of a stockholder in the company, during the existence of the pledge,

1885.]

Opinion of the Court—Deady, J.

he must submit to such deprivation until he is ready to redeem the same by the payment of his note.

On the argument it was maintained on behalf of the defendant that the sale and purchase of the sixty-two and one-half shares of stock was a material part of the transaction resulting in the contract of March 27th, and therefore no decree of cancelation ought to be made under any circumstances, unless the plaintiff is required to return the six thousand two hundred and fifty dollars received for this stock, on which terms the defendant waiving all other objections offers to consent to a rescission of the contract.

The evidence tends strongly to show that the transfer of this stock was a part of the transaction and a substantial element in the considerations which induced or caused the parties to enter into the contract of March 27th. Seeley, who seems to have been without present means and in debt to Reed, appears to have made his coming to Oregon and taking charge of the company's business, as the latter desired, conditional on the purchase of this stock, while Reed appears to have made his consent to advance money to the company conditional on Seeley's taking charge of its business; and so it would seem that the three things—the purchase, management and loan—were dependant parts of one whole.

But, as in my view of the matter, the plaintiff is not entitled to the relief sought, irrespective of this question, I do not further consider it; and if the parties wish to rescind on such terms, they can do so without the aid of the court.

There is no equity in the bill and it must be dismissed; and it is so ordered.

WELLS, FARGO & Co. v. CARR ET. AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

NOVEMBER, 5, 1885.

1. PROMISSORY NOTE—ASSIGNMENT OF MAIL CONTRACT—CUTTING DOWN ROUTE—FAILURE OF CONSIDERATION—PAROL EVIDENCE INADMISSIBLE TO VARY WRITTEN CONTRACT.—The defendants executed their promissory note in pursuance of a written contract for and in payment of an assignment to them of a governmental contract for carrying the mails, over a route which was, under the existing law, liable at any time to be cut down by the government, with a corresponding reduction of the amount to be paid. The route was cut down, after the assignment, and a corresponding reduction made in the amount of money paid under the mail contract. *Held*, in an action on said note, that the cutting down of the route, and the reduction of the amount paid, did not constitute a partial failure of consideration for the note; and that in the absence of such provision in the written contract for the assignment, parol evidence was inadmissible to show a verbal agreement, at the time the contract was made, whereby the defendants were to be liable, on their note, only for the portion of the route that was continued.

Before SAWYER, Circuit Judge.

Messrs. Pillsbury and Blanding, for the plaintiff.*Mr. William Matthews*, for the defendant.

SAWYER, Circuit Judge. This is an action on a note payable in sixteen installments. The note was given on June 30, 1882. The contract, in pursuance of which it was executed, was made on May 7, 1882. The defense set up, and attempted to be established, is a failure, or partial failure, of consideration.

In May, 1882, the Telegraph Stage company sold all its stock and material to the defendants, and also assigned a contract with the government for carrying the mails from Santa Barbara to Soledad, and, for that portion of the consideration arising from an assignment of the contract, the defendants were to pay the sum of twelve thousand dollars in sixteen installments.

Another portion was to be paid for the stock. This suit is on the note, which was given in pursuance of the agreement for the assignment of the contract for carrying the

1865.]

Opinion of the Court—Sawyer, C. J.

mails. Under the contract for carrying the mails, the carriers were liable to have the route cut down by the government, with a corresponding reduction of the amount to be paid. Such was the law at that time, in view of which the contract was made. The parties, assignors and defendants, were all well aware of that fact. The government could cut off any portion of the route. It did reduce the route some sixty miles, after the assignment, and made a corresponding reduction in the amount of money paid. It is alleged, that there was in consequence, a part failure of consideration, and that the defendants can only be called upon to pay on their note, for the portion of the route that was continued, and, it is alleged, that there was a verbal understanding at the time the contract was made, that such should be the case. The written contract, however, does not say anything of the kind. The contract for which the note was afterward substituted, was made on May 7th, and is as follows: "It is hereby agreed and understood between I. E. Haskell, superintendent of the Telegraph Stage company, and Wm. H. Taylor, superintendent of Coast Line Stage company, each authorized and acting for their respective companies, that in consideration of the sale of certain stage property, between Santa Barbara and San Luis Obispo, California (more fully described in an article of bargain and sale between the parties to the foregoing, of this date), and the transfer by C. H. Cotter of the Telegraph Stage company, the mail contract between Santa Barbara and Soledad, California, from July 1, 1882, until June 30, 1886, to the said Coast Line Stage company. The said Coast Line Stage company, by their agent, W. H. Taylor, bind themselves to pay to the said A. E. Haskell of the Telegraph Stage company, the sum of twelve thousand dollars, to be divided into sixteen payments, of seven hundred and fifty dollars each, the first payment to be made on December 10, 1882, and the same amount (seven hundred and fifty dollars), to be paid every three months thereafter until the whole is paid. This memorandum to be void after transfer of said mail contract and other arrangements made

necessary to the full completion of the foregoing agreement."

This is the contract, as reduced to writing at the time, which provides that twelve thousand dollars are to be paid, and nothing is said about any deduction to be made, in case the distance should be cut down by the government. The note was executed, in pursuance of the agreement, subsequently, on June 30, on the transfer of the property, when the transaction was completed, and no deduction is provided for in the note upon the curtailment of the route. Mr. Taylor testifies, that at the time of making the contract, it was agreed between him and Haskell, that if the route should be razed so as to cut off a portion, there should be a proportionate reduction of the amount to be paid for the assignment. The contract being in writing, I am inclined to think, that this fact, if it be a fact, could not be given in evidence. It would contradict or enlarge a written contract by parol evidence. If it were admissible, Mr. Haskell testifies, directly, and, positively, to the contrary. He said no such agreement was made by him. He denies it point blank. Mr. Taylor, himself, does not profess to have been present, when the note was given, and he admits that he was not. Mr. Haskell and Mr. Cotter both testify, that there was nothing whatever said about razeing, or cutting down the route at that time. At that interview four of the parties were present, two on each side. Buckley and Carr representing the parties giving the note, and Cotter and Haskell representing the other parties. Both Cotter and Haskell say, that, at that time, nothing was said about the matter, and Buckley and Carr are not put on the stand at all, so there is no testimony on that side as to what took place at the time of the making of the note. Neither the contract nor the note says anything about deduction, and, at the making of the note nothing was said about it. All who testify, for plaintiff say, that, they never heard of any such qualification of this contract as is now set up. There is no evidence except Taylor's to show anything of the kind, and the positive testimony of two witnesses is in harmony with the written contracts to the contrary. As to what took

1885.]

Opinion of the Court—Sawyer, C. J.

place at the making of the contract the testimony is directly contradictory, and Haskell's statement is positive. The fact that it was not mentioned in the written contract is confirmatory of his statement. Admitting that the testimony is admissible, but I think it is not, still the defense is not made out.

Aside from a failure of proof on this point, defendants seem to rely on the fact, that there is a partial failure of consideration. But there is no failure of consideration. Defendants simply took an assignment of that contract, knowing that the distance, as is the case in all government mail contracts, was liable to be cut down. The contractors transferred all they could transfer—all their rights under the contract. They assigned the contract as it was, and all there was in them to assign. The defendants got all they purchased, all that was assigned, all that could be assigned. They got the entire contract as it was. They stepped into the assignors' shoes, knowing that a portion of the route was liable to be cut off—knowing exactly what they bought. Under the law, it was well known that the government was entitled, at any time, to cut off a portion of the route. It was one of the terms of the contract, express or implied, that it might be cut down, and the parties got an assignment of all they purchased, with full knowledge of the terms of the contract. The defense is, therefore, not sustained, and there must be judgment for the complainant. There will be a finding for the installments due, and the interest due thereon. There was an attempt to show that part payment had been accepted, as a full payment of all that was due, recognizing the agreement set up. The evidence satisfies me that there was no such acceptance. The receipt was on account, by parties who knew nothing about the agreement at the time, and they promptly repudiated any such agreement. The payments were received on account, and never accepted as full payment. There will be a general finding drawn in favor of the plaintiff for the amount due and unpaid, and the interest.

D. P. THOMPSON, RECEIVER, v. THE PHOENIX INSURANCE COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 8, 1885.

1. LIMITATION ON RIGHT TO SUE ON A POLICY OF INSURANCE.—A policy of insurance contained in effect this stipulation: 1. No action shall be commenced hereon to recover for a loss hereunder until the amount thereof is ascertained by agreement or arbitration; and, 2. No such action shall be maintained unless commenced within one year after the date of the fire from which the loss occurred. *Held*: That unless the assured was prevented by the action or non-action of the insurer, in the matter of ascertaining the amount of the loss, he must commence his action therefor within the time specified in the stipulation.
2. REFORMATION OF POLICY.—A demurrer to a bill for the reformation of a policy of insurance will be sustained, when it appears that by reason of the lapse of time no action can be maintained thereon for any cause, when reformed. A court will only decree the reformation of an instrument as a means of enabling a party thereto to assert or maintain some right thereunder.

Before DEADY, District Judge.

Mr. Henry Ach, for the plaintiff.*Mr. P. L. Willis* and *Mr. Milton Smith*, for the defendant.

DEADY, J. On April 21, 1884, the defendant, in consideration of the sum of three hundred dollars paid to it by E. S. Kearney, insured him, as "Receiver for *Holladay v. Holladay*," in the sum of five thousand dollars against loss or damage by fire on a half interest in the Clarendon hotel and furniture, for the term of one year from April 27th; and on the night of May 19, 1884, the property was destroyed by fire.

This suit was brought on July 10, 1885, to reform the policy by the plaintiff, as the successor of Kearney in said receivership.

The bill alleges that by mistake the policy was made payable to said Kearney, "instead of the receiver in said suit of *Holladay v. Holladay*, and his successors, and for the benefit of whom it might concern;" and prays that it may be reformed by adding therein, after the words "E. S. Kearney,"

1885.]

Opinion of the Court—Deady, J.

the words “‘as receiver in the suit of Benjamin Holladay against Joseph Holladay, for and on account of his successors, as such receiver, and for the benefit of whom it might concern;’ and that the sum so insured by said defendant on said building and furniture be paid to your orator accordingly.”

The defendant demurs to the bill, and for cause of demurrer, assigns, among others, the following: “The plaintiff’s right is barred, because he did not commence this suit within twelve months next after the date of the fire from which the loss occurred.”

The policy contains a stipulation, to the effect that a loss arising thereunder is not payable until the proof thereof is furnished, and in case of arbitration, the award fixing the amount thereof is had; and also this:

“It is furthermore hereby expressly provided and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be maintainable in any court of law or chancery, until after an award shall be obtained, fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur; and should any suit or action be commenced against this company, after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.”

There is no claim that the right to bring this suit has been delayed over a year from the date of the fire from which the loss occurred, by any dispute concerning the value of the property destroyed. On the contrary, it appears from the bill that the proof of the loss was duly made and that the amount of it is not contested, but that the payment thereof is refused to the plaintiff solely on the ground that by the terms of the policy it is payable to Kearney only.

Therefore, the question does not arise in this case, whether an action could be maintained on this policy by the

assured, after the expiration of a year from the date of the fire, in case he had been delayed in the commencement of the same, on account of a dispute and arbitration concerning the amount of the loss.

Cases may arise under such a policy, when the dispute and arbitration are, without any fault of the assured, so prolonged, that unless he is allowed to commence an action after the expiration of a year from the date of the fire, he would, under the combined operation of these two stipulations, be deprived of all legal remedy.

But in this case the suit was not brought until thirteen months and twenty-one days after the fire at which the loss occurred, and no excuse or reason is given for the delay.

It is well established that a stipulation limiting the time within which an action may be brought on a policy of insurance is valid and binding on the parties thereto; but that if it is ambiguous, either in itself or taken in connection with other provisions or stipulations in the policy, the ambiguity must be resolved in favor of the assured. See *Spare v. Home Mutual Insurance Company*, 9 Sawy. 145, and cases there cited.

The stipulation for limitation in this policy is, considered by itself, plain and susceptible of but one meaning; and putting aside the provision concerning an award as inapplicable in this instance, there is nothing in the policy to qualify or render it doubtful.

Unlike the stipulation in *Spare v. Home Mutual Insurance Company*, *supra*, in which the right to sue was limited to one year from the time the loss "occurred," which, in conjunction with the sixty days also allowed the company to ascertain whether any loss had "occurred," and make payment thereof, was held to mean one year from the expiration of said sixty days, the limitation in this case is a year from a day certain, to wit: the day of the fire; and unless the assured is prevented by the action or non-action of the company in the matter of ascertaining the amount of the loss, from commencing an action within that time, he must do so or he will be barred therefrom.

But it is said that this is a suit to reform this contract, as

well as to enforce it, and that the stipulation as to time does not apply to a suit for such relief, and therefore the demurrer is too broad and must be overruled.

But the court will not reform an instrument merely for the sake of reforming it, but only to enable a party to assert some right thereunder; and if an action thereon by the assured to recover the amount of loss is already barred by lapse of time, there is no claim that can be asserted under it against the defendant.

In *Davidson v. Phoenix Insurance Company*, 14 Sawy. 594, Mr. Justice Field held, in a case like this, that when the remedy on the policy for the insurance was barred, according to the stipulation therein, by lapse of time, the court would not undertake to reform the instrument, because there was "no occasion" for so doing.

This conclusion is not reached without reluctance. So far as appears, there is, in good morals, no sufficient reason why the defendant should not pay this claim according to the real intention of the parties to the contract—that is, to the receiver for the time being in the case of *Holladay v. Holladay*, for the benefit of whom it may concern. Such cases as this suggest the necessity of some legislation simplifying the contract of insurance, and within certain limits, declaring its effect; and in case of loss, who may claim the benefit of it, and maintain an action against the insurer to enforce it.

But as it is, the parties to this contract have deliberately agreed, that unless the assured brings his action to recover for the loss within a year from the date of the fire, he is forever barred from so doing, and the court cannot disregard the stipulation.

Nor is it intended to suggest that this limitation of the time in which to sue is either unwise or unjust. In this class of cases especially, every consideration of justice and convenience require that claims for losses should be speedily settled, while the witnesses are within reach and the facts are fresh in their recollection.

But the law should have come to the aid of this defective contract and authorized the plaintiff to maintain an action

Points decided.

[November,

thereon to recover this loss, as the successor in office of the person who effected the insurance, for the benefit of whom it might concern, without any reformation of the instrument, or delay on that account.

The demurrer is sustained and the bill dismissed.

WELLS, FARGO & Co. v. MINER ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

NOVEMBER 9, 1885.

1. UNITED STATES COURTS OF EQUITY—STATE STATUTES ENLARGING EQUITABLE RIGHTS APPLICABLE TO.—A state statute merely regulating procedure is not applicable to United States courts of equity. But, where a state statute enlarges a party's equitable rights, by creating a new remedy, under given circumstances, such equitable rights may be enforced in the United States circuit court.
2. THE SAME—CALIFORNIA STATUTE ENLARGING RIGHT OF INTERPLEADER.—Section 386 of the California code of civil procedure, provides that "whenever conflicting claims are, or may be made, upon a person for, or relating to, personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead, and litigate their several claims among themselves. The action of interpleader may be maintained, and the applicant, or plaintiff, be discharged from liability to all or any of the conflicting claimants, *although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.*" Held, that such provision is not a mere regulation of procedure; that it creates a new right by enlarging the scope of the remedy; and that the right to interplead adverse claimants, so created, may be enforced in equity in the United States circuit court.
3. THE SAME—INTERPLEADER UNDER ORIGINAL CHANCERY PRACTICE—CASE IN JUDGMENT.—The defendant S. sold a mining claim to the defendant, the S. D. Co., for ten thousand dollars, and received in payment a check for that amount on the Bank of California. S. deposited the check with the complainant, who, thereupon paid him two thousand five hundred dollars, and issued to him a certificate of deposit for seven thousand five hundred dollars, payable to him "or order, on return of this certificate properly endorsed." By *mesne* assignments before maturity, the certificate came into the possession of defendant M., who claims to be the owner and holder thereof, but he is alleged not to be a holder in good faith. The S. D. Co., claims that in the sale of the mine, S. made certain false and fraudulent representations, by reason whereof they are entitled to rescind the sale, and recover back everything of value which they paid to S. The defendants, M. and S. D. Co., have each sued

1885.]

Opinion of the Court—Sawyer, C. J.

the complainant, the former to recover on the certificate of deposit, and the latter to enjoin its payment, until the determination of a suit, brought by them to rescind the sale. The complainant, thereupon brought the present suit in equity to compel the defendants to interplead, and to restrain the prosecution of the actions against them respecting the certificate, until the determination of the present suit. *Held*, that the case is a proper one for an interpleader, under section 386 of the code of procedure of California, and intimated that under the chancery practice, as it originally existed before the enlargement of the scope of the remedy by said section, the complainant was entitled to interplead the defendants, because the same thing—the certificate of deposit—is claimed by both the S. D. Co. and M.; their claims being derived from a common source—the original transaction between the S. D. Co. and S.; and the complainant claiming no interest against, and having incurred no independent liability to, either of the defendants.

Before SAWYER, Circuit Judge.

Messrs. Pillsbury & Blanding, for the complainants.

Messrs. Langhorne & Miller, for the defendants.

SAWYER, Circuit Judge. This is an application for a preliminary injunction, in a suit on the equity side of the court, brought by the banking house of Wells, Fargo & Co. against Richard S. Miner, Frank Silva, and the Southern Development company of Nevada, to compel them to interplead with one another respecting a certain certificate of deposit for seven thousand five hundred dollars, which was issued by complainant to defendant, Silva. From the papers used on the hearing, it appears that Silva sold a mining claim to the Southern Development company, for an agreed price, of ten thousand dollars, and received in payment a check for that amount on the Bank of California. Silva deposited the check with the banking house of Wells, Fargo & Co. who thereupon, paid him two thousand five hundred dollars in coin, and issued to him a certificate of deposit for seven thousand five hundred dollars, "payable to Frank Silva, or order, on return of this certificate properly endorsed." By *mesne* assignments, before maturity, the certificate came into the possession of the defendant, Miner, who now claims to be the owner and holder thereof, but he is alleged by the Southern Development company, not to be a holder in good faith. The Southern Development company claims, that in the sale

Opinion of the Court—Sawyer, C. J.

[November,

of the mine, Silva made certain false and fraudulent representations as to its character and value upon which it relied, and by reason thereof, it is entitled to rescind the sale, and recover back everything of value which it paid to Silva. Accordingly, before any presentation of said certificate for payment, the Southern Development company notified Wells, Fargo & Co. that the check on the Bank of California, had been obtained by Silva by means of fraud, misrepresentation and deceit, and, that it claimed the certificate in question, and warned them not to pay it to Silva. The Southern Development company, then caused Silva to be arrested and prosecuted on the criminal charge of obtaining money under false pretenses; but the jury disagreed on the trial, and, thereupon, the district attorney dismissed the information, and the prisoner was discharged. The Southern Development company then, brought a civil action against Silva, which is now pending in this court, to recover fifteen thousand dollars damages, alleged to have been suffered by reason of the fraudulent misrepresentations aforesaid, of which suit it notified complainant. It, also, brought suit against Wells, Fargo & Co. in which neither Silva nor Miner was made a party, to enjoin the payment of the certificate, until the determination of the aforesaid action against Silva for fifteen thousand dollars damages. In this suit, Wells, Fargo & Co. suffered a default, and judgment was rendered against them according to the prayer of the complaint. At this point, Miner presented the certificate to Wells, Fargo & Co. for payment, which was refused on the ground that they had been enjoined, and thereupon, Miner instituted an action at law on the certificate against Wells, Fargo & Co. in this court. They appeared in that action, and made a motion, under section 386 of the code of civil procedure of California, that the Southern Development company be substituted in their place and stead, as defendant. This motion was argued elaborately, and denied by the district judge of Nevada, holding the circuit court, on the ground that an equitable cause of suit could not be thus injected into an action at law in the United States courts. Thereupon, Wells, Fargo

1885.]

Opinion of the Court—Sawyer, C. J.

& Co. instituted the present suit in equity, to compel the defendants to interplead, and they now move for a preliminary injunction, restraining the prosecution of the actions against them respecting the certificate until the determination of the rights of the parties upon an interpleader. They offer to pay the money into court for the benefit of the party, who shall be adjudged entitled to it.

The defendant, Silva, disclaims all interest in the subject matter. The Southern Development Company makes no opposition to the motion, and Miner opposes it, on the ground that it is not a proper case for an interpleader.

The question as to whether this is a proper case for an interpleader has been very elaborately argued. There are about four hundred pages of printed arguments, and a very extensive collection, and careful analysis of the authorities, showing the different circumstances under which interpleaders have been denied, and wherein they have been allowed, in courts of equity. This is a motion for an injunction to restrain the prosecution of those suits, until the determination of the rights of the parties on the bill for interpleader. The defendants do not deny that the complainants are entitled to the injunction, provided the case is a proper one for a bill of interpleader. They say it is not within the class of cases, in which courts of equity, under the chancery practice, as it, heretofore, existed, and under the law of England, have interfered. Conceding defendants to be right on this proposition, it is still, in my judgment, within one of the provisions of the code of civil procedure of the state of California, provided that provision is applicable. Section 386, among other things, provides as follows:

“And whenever conflicting claims are, or may be made, upon a person for, or relating to, personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead, and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant, or plaintiff, be discharged from liability to all, or any of the conflicting claimants, *although their titles*

or claims have not a common origin, or are not identical, but are adverse to, and independent of, one another."

The contention here is, that these claims have not a common origin, are not identical, that there is an independent claim, and, therefore, that they are not within the original chancery jurisdiction. If this clause be applicable, and can be acted upon in this court, it abolishes the distinction resting upon these elements. It is insisted on the part of the defendant, here, that the statute cited is not applicable to the United States courts of equity, as the code of procedure does not apply on the equity side of the courts. If it were merely a provision regulating procedure, undoubtedly, it would be so, but I think it is more than that. It gives a right to a party in equity. It enlarges his equitable rights—it enlarges the scope of his remedy. It is not a question of enlarging the jurisdiction of the court. It gives a new remedy—a new right in the form of a remedy. I think it is within the rule as established by the supreme court of the United States in the Broderick will case, which was an appeal from this court. In that case, there was a bill filed to set aside and vacate the will, and the probate of the will of Broderick. This court dismissed the bill. The case went to the United States supreme court on appeal; and, in deciding the case, the supreme court says:

"It is undoubtedly the general rule, established both in England and in this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will, or the probate thereof."

Then, in commenting on the statute of California of 1862, which in the district court of the state, gave the new remedy, the court says:

"The statute of 1862, has been referred to, which gives the district courts of California power to set aside a will obtained by fraud or undue influence, or a forged will, and any probate obtained by fraud, concealment or perjury. Whilst it is true, that alterations of jurisdictions of the state courts cannot effect the equitable jurisdiction of the courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may

1885.]

Opinion of the Court—Sawyer, C. J.

be administered by the circuit courts, as well as by the state courts. And this is probably a case in which an enlargement of equitable rights is effected, although presented in the form of remedial proceedings. (Broderick's Will, 21 Wall. 519-20.)

In that case, then, the court suggests, that new equitable rights, granted by statute of the state, may be enforced in the circuit courts of the United States, but affirms the decree of the Court below, on the statute of limitations.

In Ohio, an act was passed authorizing the restraining of the collection of taxes, which was a remedy that did not before exist under the circumstances provided for, in courts of equity. A case went to the supreme court of the United States from Ohio, arising under that statute, and the court says in regard to it:

"Though we have, repeatedly, decided in this court that the statute of a state cannot control the *mode of procedure in equity cases in the federal courts*, nor deprive them of their separate equity jurisdiction; we have also held, that, where a statute of a state conferred a new right, or provided a new remedy, the federal courts will enforce that right, either on the common law or equity side, of its docket, as the nature of the new right, or the new remedy requires. *Van Norden v. Morton*, 99 U. S. 378." (*Cummings v. National Bank*, 101 U. S. 157.)

In the case of *Curtis v. Sutter*, 15 Cal. 262 the statute provided under the old practice act of California, then section 254, that a party in possession of land might bring a suit against a party out of possession setting up an adverse title, to determine that adverse claim. It was held in *Curtis v. Sutter*, that this provision gave a new remedy—that it enlarged the scope of the remedy, and to that extent gave a new right in equity. That right did not exist before. Under the statutes of Nevada there is a similar provision. A suit was brought there to determine the adverse claim in the case of *Dyer v. The Central Pacific Railroad Company*, 1 Sawy. 649. The question arose whether the United States circuit court could administer that remedy—it being a new remedy. Mr. Justice Field, in commenting on the statute, said:

"The statute, it is true, enlarges the class of cases in

Opinion of the Court—Sawyer, C. J.

[November,

which jurisdiction was formerly exercised in quieting the titles and possession of real property. It dispenses with the necessity of a previous establishment of the right of plaintiff by repeated judgments in his favor in actions at law. (*Curtis v. Sutter*, 15 Cal. 259; *Stark v. Starr*, 6 Wal. 409.) To that extent it confers upon the possessor of real property a *new right*,—one that enables him without the delay of previous proceedings at law, to draw to himself, all outstanding inferior claims. That *right the national courts will enforce in the same manner in which they will enforce other equitable rights of parties.*" (Citing *Clark v. Smith*, 13 Peters, 203.) Those rights have been enforced repeatedly in the supreme court of the United States, and the doctrine is now recognized in numerous cases, as in *Holland v. Challen*, 110 U. S. 16, and *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405. In the last case the right was extended by state statute still further. It was extended to the party out of possession as does the present statute of California. And the remedy was, also, extended to the cancellation of a deed void on its face, for which there was before no remedy in equity. The supreme court held, that the party out of possession could maintain that suit in equity to cancel a deed void on its face in the United States court. *Chapman v. Brewer*, 114 U. S. 170-1; *Cummings v. The National Bank*, 101 U. S. 157; *Van Norden v. Morton*, 99 U. S. 378, cases to which I have already called attention, and *Ellis v. Davis*, 109 U. S. 485, establish this doctrine. The right here is precisely analogous to those. The statute gives a new right, and if this case does not come within the rule before established by courts of chancery in regard to the points made, I think, under the statute, the remedy is so enlarged as to cover the case, and as it now stands, the right can be enforced in a court of equity of the United States. The statute gives a new right—an enlargement of the scope of the remedy; and it being a case, peculiarly, of equitable cognizance, it can be enforced on the equity side of the court.

Professor Pomeroy regards the remedy as being enlarged by the statute, and, under the authorities, that it will be enforced by courts of equity. He comments upon the statute in the notes to section 1,324, 3 Pomeroy's Equity.

1885.]

Opinion of the Court—Sawyer, C. J.

I am, by no means, certain, that the case is not one for interpleader, under the chancery practice as it, originally, existed before the enlargement of the scope of the remedy by statutory provisions. These are the elements laid down by Professor Pomeroy in his equity jurisprudence, required to justify an interpleader.

"1. The same thing, debt or duty, must be claimed by both." Both the Southern Development Company and Miner, claim to be entitled to the certificate of deposit in question, and to receive the money that is due upon it.

"2. All adverse titles or claims must be dependent, or derived from a common source." These claims all come from the same source—the original transaction between the Development Company and Silva—the rights of all depend upon the acts of Silva—and upon the acts of complainant dependent upon the acts of Silva. The Development Company claims, that Silva obtained from it the ten thousand dollar check on the Bank of California, by fraud, misrepresentation and deceit, and, therefore, that the transaction is void, and that the party giving the check is entitled to it. Had Silva never parted with the check and the contest been between him and the drawer, can there be a doubt, that the claims would have come from a common source? If not, can passing the check to another, with notice, change the character of the act in this respect? Silva, simply, changed the check into a certificate of deposit, amounting to seven thousand five hundred dollars, substituting one for the other, thereby not only committing a fraud on the Development Company, if it be a fraud, but also, on Wells, Fargo & Co. in obtaining the certificate of deposit. Miner is simply a claimant under Silva, and the latter only substituted one party, who is claimed not to be an innocent assignee, in the transaction, for another, and one commercial instrument for another. They all, therefore, claim from the same source, and all the claims arise out of and are dependent upon the same act.

"3. Complainant seeking relief must not have, or claim, any interest in the subject matter."

The complainants in this case claim no interest against

either. They are ready to pay the money into court for the benefit of the party entitled to it. They stand neutral between the two parties.

“4. He must have incurred no independent liability to either of the claimants, that is, he must stand perfectly indifferent between them in the position purely as stakeholder.”

I do not see how claimants stand in any other than a dependent position. Because they have issued a certificate of deposit it is claimed that they have entered into an independent contract. How independent? As the case now stands, they are liable only on the certificate. There is but one liability, and that is on the certificate. No party is entitled to recover against them without returning that certificate, properly endorsed. Should they pay the money to Miner, and it turn out, that he is not entitled to receive it, they might be liable to complainant, but the liability would rest upon different grounds. Those grounds do not now exist, and, there is, at this time, but one cause of action, and that is on the certificate. The only question, then, is, who is the owner of that certificate? The contest is, as to this specific thing—this piece of commercial paper. There is no liability independent of that certificate. They are, now, liable on that and on nothing else. How can this be an independent liability in the sense of the rule? It is true, Wells, Fargo & Co. became debtors, but, only on the certificate. As before said, no recovery can be had against them except upon this certificate of deposit. The title to the certificate of deposit, is in issue here, between these parties, and it is the only issue. The Development Company claim that they own it, by reason of the fact that it was obtained from them by fraud, and Miner claims that he owns it, either because there is no fraud, or if there was, because he is a *bona fide* holder for value without notice of the fraud. Complainants are not liable to both. It is a mere question, as to who owns that certificate of deposit. That is the question at issue. And it is a matter of entire indifference to complainants which owns it. They are mere stake holders. That question the claimants ought to litigate between them-

1885.]

Opinion of the Court—Sawyer, C. J.

selves. The adverse claimants are the only ones to blame, for the dilemma in which complainants are placed, and they ought to assume the burden of relieving complainants from the dilemma.

The defendants are liable on that certificate either to the Development Company, or to Miner. They are not liable to both. They do not know which. That is the very thing to be ascertained. The doctrine relied on to deny an interpleader is that announced in *Crawshay v. Thornton*, 2 Mylne & C. 1, an English case, decided before the present system of practice in England went into effect. It is very doubtful, in my mind, whether that doctrine would be sustained, at this time, even in England. The observations of a number of English judges made, subsequently, to the decision of that case, and to the change of the law by statute, indicate that they repudiate the doctrine there announced, and regard the grounds on which the distinction is rested as being very narrow. The act of 1860, in England, like the provisions of the California code of procedure, which I have just read, has abolished the distinction taken in that case. The provision is similar to our statute. I presume our statute was adopted from the English act of 1860. I should be very much disposed to hold the case to be a proper one for interpleader, even if it stood on the ordinary principles of equity jurisprudence alone, without the aid of this act enlarging the equitable rights of parties in such cases. At all events, I am satisfied that, by this act, a new right was created broad enough to reach the case, which can be forced in this court.

I am satisfied, therefore, that it is a proper case for a bill of interpleader, and that the injunction should be granted. The motion is granted, on giving security in the sum of ten thousand dollars.

Points decided.

[December,

WILLIAM SHARON v. SARAH ALTHEA HILL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

DECEMBER 26, 1885.

1. PLEA IN ABATEMENT.—The defendant pleaded in abatement that the plaintiff was not a citizen of the State of Nevada, as he alleged, but of California, to which the plaintiff replied; when the plea was duly set down for hearing, without any evidence being taken or offered in support thereof, and overruled, and the defendant allowed a day within which to answer to the merits; *Held*, that the plea was properly disposed of, and that the question of plaintiff's citizenship, for the purposes of the case, was thereby determined, unless a rehearing was asked for and allowed, and that the same defense could not be made again in the answer to the merits.
2. PRODUCTION AND INSPECTION OF PAPERS.—Where a party to a suit for the annulment of an alleged false writing willfully refuses to produce the same and submit it to the tests and examination necessary and convenient to enable the court to determine the question of its falsity, the legal inference is that such production and examination would tend to prove the falsity of the paper; and the same inference may be made from a like refusal to produce and similarly submit any other paper or item of evidence bearing on the question.
3. CONTRADICTION OF WITNESSES.—The contradiction by one witness of the statement of another does not necessarily impeach or affect the credibility of either; for the contradiction may arise from mistake or other cause consistent with the integrity of both witnesses.
4. CITIZENSHIP.—Citizenship is a *status* or condition, resulting from both act and intent; and no one can become a citizen of any state of the Union by merely intending to, nor by residence therein without or contrary to such intent; but the former is evidence more or less cogent, according to circumstances of the latter.
5. *IDEM*—FOURTEENTH AMENDMENT.—The first clause in section 1 of the fourteenth amendment is a restraint on the power of a state, so that it cannot exclude a citizen of the United States, resident therein, from the citizenship thereof; but such amendment does not have the effect to make such resident a citizen of such state against his will and intention.
6. ESTOPPEL BY ADJUDICATION.—Parties to a legal proceeding in which any question is directly involved and determined are estopped to re-litigate the same question in any other proceeding, whether commenced before or after the one in which such adjudication took place, or in the same or another forum. *SAWYER, J. dubitante.*
7. APPEAL FROM JUDGMENT IN CALIFORNIA.—By the law of California the judgment of a court is not final until the case has been heard on appeal or the time for taking one has expired; and such judgment cannot be used as an estoppel against either party thereto, pending such appeal, which suspends its operation for all purposes.

1885.]

Points decided.

8. JUDGMENT OF STATE COURT IN NATIONAL COURT.—The law of the state in which a judgment is given furnishes the rule by which its effect and operation are determined in the national courts.
9. CONSENT, WHEN NOT AN ESTOPPEL.—The mere consent that a case pending on a motion to remand may be remanded, or that it may be assigned to a particular judge for trial, according to the organization and order of proceeding in the court where it is pending, does not have the effect to estop the consenting party from litigating any question involved in such case in another proceeding.
10. RIGHT TO SUE IN NATIONAL COURTS.—Proceedings in a suit in the United States circuit court, will not be stayed, until a suit subsequently brought and pending in a state court between the same parties, involving some of the same questions, can be, finally, determined, for the purpose of giving effect to such final determination by way of estoppel. To do so, would be, in effect, to arbitrarily, deny the party entitled to sue in the circuit court, a remedy in that court.
11. CASE IN JUDGMENT.—In the fall of 1883 the defendant made a claim to be the wife of the plaintiff by virtue of an alleged secret declaration of marriage, purporting to have been signed by the parties on August 25, 1880, and a subsequent residence in a hotel belonging to the plaintiff and adjoining another in which he lived, from the latter part of September of the same year to the early part of December, 1881, and the receipt during this time of five hundred dollars a month from the plaintiff, after which, being expelled from her hotel by him, she lived about in San Francisco, and always went by her maiden name and passed for an unmarried woman; when on October 3, 1883, the plaintiff brought this suit to cancel and annul said alleged declaration as being false and forged, whereupon the defendant exhibited sundry letters purporting to be written to her by the plaintiff while she resided at his hotel, and addressed, "My Dear Wife;" *Held*, on the testimony of the parties, the experts, and the face of the alleged declaration and letters, that the same are false and forged—the former having been written by the defendant over a simulated signature of the plaintiff's, and the latter being a tracing made by her of a letter in ink written by the plaintiff, substituting in the process the word "Wife" in the address for "Miss Hill" or "Allie," and such substitution simply in the address of others written by him in pencil; and also that the contemporaneous conduct of the parties, and particularly that of the defendant, was altogether incompatible with the claim of marriage, or the existence of any such declaration or letters, and therefore the same are false and forged.

Before SAWYER, Circuit Judge, and DEADY, District Judge.

Mr. W. H. L. Barnes, Mr. William M. Stewart, Mr. H. I. Kowalsky, and Mr. Oliver P. Evans, for the plaintiff.

Mr. George W. Tyler, Mr. W. B. Tyler, and Mr. David S. Terry, for the defendant.

By the Court, DEADY, J. This suit was commenced on October 3, 1883, to have a certain alleged declaration of marriage between the plaintiff and defendant declared to be false and fraudulent and delivered up to be canceled and annulled, and to enjoin the defendant from the use thereof.

It is alleged in the bill that the plaintiff is a citizen of Nevada and the defendant a citizen of California; that the plaintiff has never been the husband of any woman but one, who died in 1875, leaving three children, the issue of said marriage; and that he is possessed of a large fortune and has a large business and social connection; that the defendant is an unmarried woman of about thirty years of age, who has resided in the city of San Francisco for some years, and within two months past has publicly claimed and pretended to be the wife of the plaintiff, to whom she alleges she was duly married on August 25, 1880, in San Francisco, by means of a joint declaration of marriage, made in conformity to section 75 of the civil code of California; that said claim and pretense are wholly false and untrue and are made by the defendant for the purpose of obtaining credit and support at the expense of the plaintiff, and to obtain money from him, or in case of his death, from his heirs, to quiet the same; that the defendant now claims to have said declaration in her possession, but the plaintiff never saw or heard of it until within a month past, and is informed that it is substantially as herein set forth; and that the same is false and forged and null and void, and ought, as against the plaintiff, to be so declared and delivered up to be canceled and annulled.

On December 3, 1883, the defendant demurred to the bill for want of equity, and on March 3, 1884, the court (Sawyer and Sabin, JJ.) gave judgment overruling the demurrer, on the ground that the instrument, if false or forged, might be hereafter used to obtain a false claim to an interest in the plaintiff's property at a distance of time when the proof of its fraudulent character was unattainable. (10 Sawy. 48.)

On April 24, 1884, the defendant pleaded in abatement of the suit:

1885.]

Opinion of the Court—Deady, J.

1. Another suit pending in the superior court of the state, between the same parties, commenced on November 1, 1883, by the defendant for a divorce from a marriage with the plaintiff, by means of said declaration and the subsequent cohabitation of the parties thereto, until November, 1881, on the ground of adultery and desertion by the plaintiff; which suit was, on November 20, 1883, removed to this court, on the petition of the plaintiff, and afterwards, on December 31, 1883, in pursuance of the stipulation of the parties, was remanded to said state court; and that said suit was then on trial therein on the question of whether the plaintiff and defendant are husband and wife, by reason of said declaration and cohabitation; and 2. The court has no jurisdiction of the matters set forth in the bill herein, because the plaintiff is a resident and citizen of California.

To this the plaintiff, on May 5, 1884, replied that he ought not to be "barred" from the relief prayed for by reason of the matters set forth in the plea, and that it is not true that he is a citizen of California.

On October 16, 1884, the three months allowed by equity rule 69 for taking evidence on the issue made on the plea having expired, the cause was regularly brought on for hearing on the bill, plea, and replication, when the court (Sawyer, J.) gave judgment for the plaintiff, overruling the plea, with leave to the defendant to answer to the merits within thirty days.

The court, after calling attention to the fact that the plea was bad for duplicity, said, in substance—admitting the allegations concerning the pendency of the suit in the state court, it did not appear that they were for the same purpose or relief; and if they were, the plea was so far insufficient, because the two suits were pending in courts of different jurisdictions; and there being no proof in support of any allegation in the plea it was overruled. (10 Sawy. 394.)

On December 30, 1884, the defendant answered the bill, denying that she is an unmarried woman; that the plaintiff is a citizen of Nevada, and averring that he is a citizen of California; that plaintiff never was the husband of any person but his deceased wife, and that he was unmarried at the

Opinion of the Court—Deady, J.

[December,

filing of the bill ; that defendant's claim to be the wife of the plaintiff is false or made for any purpose but to obtain recognition and support as his wife, and admitting that she had made such claim for the past fifteen months ; that defendant was never the wife of the plaintiff or that said declaration is null and void or false and forged ; and avers that the parties were married on August 25, 1880, and that said declaration is valid and genuine.

The answer also contains what is styled therein "a further and separate answer and defense," to the effect that "the plaintiff ought not to be permitted to prosecute this suit," because on August 25, 1880, the parties by agreement became husband and wife, and "assumed towards each other that relation," but said marriage not being solemnized, as provided in section 70 of the civil code of California, the plaintiff and defendant on said day jointly made a declaration of marriage, as set forth in the bill, and thereafter, until November, 1881, cohabited together as husband and wife, when the plaintiff refused to recognize said marriage, and deserted the defendant ; that on November 1, 1883, the defendant, as Sarah Althea Sharon, commenced an action against the plaintiff, in the superior court of San Francisco, for divorce, and that "the allegations of marriage in the complaint" therein "were principally founded upon said declaration of marriage."

The answer then sets forth *in extenso* the removal of such action to this court and the remanding of the same, in pursuance of the stipulation as aforesaid, and then proceeds:

That by the stipulation of the parties such action was assigned to department two of said superior court for trial before a judge thereof, without a jury, and the same was so tried between March 10 and September 17, 1884 ; that thereafter, on December 24, 1884, said judge found and decided: 1. That the parties to such action were and had been since August 25, 1880, husband and wife. 2. That said declaration of marriage is "true and genuine," and was signed by the defendant therein, and that said parties had cohabited together as husband and wife ; and 3. That the defendant had deserted the plaintiff, and the latter was entitled to a divorce and a division of the common property.

1885.]

Opinion of the Court—Deady, J.

Wherefore, it is averred that the question of the "genuineness" of said declaration, which is now sought to be tried in this suit, is the same question that was adjudged and determined in said superior court, and has, therefore, become *res adjudicata* as between "the parties hereto.

On January 2, 1885, the general replication was filed to this answer, and on February 5 the defendant filed a supplemental answer, alleging that since the filing of the former answer said superior court had filed its findings and decree, wherein it is adjudged that said declaration is a genuine contract of marriage between the parties hereto, and said parties thereby became husband and wife. Subsequently, the defendant in *Sharon v. Sharon* duly took an appeal from the judgment therein, and gave notice of a motion for a new trial, both of which proceedings are still pending and undetermined.

The evidence was taken orally before an examiner of the court during the period between February 5 and August 11, 1885, and covers one thousand seven hundred and thirty-one pages of legal cap, written with a type-writer. Besides this, there are a large number of exhibits, consisting of enlarged drawings or tracings of the disputed writings and particular parts and peculiarities of them, and of the admitted writings of the parties, together with a large number of bank checks containing the plaintiff's signature and photographic copies of the declaration, five letters alleged to have been written by the plaintiff to the defendant, and known as the "Dear Wife" letters, a letter from the plaintiff to S. F. Thorn, dated October 16, 1880, four letters written by the defendant to the plaintiff, during the years 1881 and 1882, and a letter to the plaintiff written in 1882, and signed "Miss Brackett," besides tracings and other writings of third persons.

The plaintiff having testified on the first day of the examination that the declaration was false and forged, an effort was then made by the plaintiff to have the defendant produce the same before the examiner for inspection by the expert witnesses of the plaintiff, which she evaded doing until February 25, when she was compelled to do so by the

order of the court; and on March 16, in pursuance of a like order, she produced three of the five "Dear Wife" letters, known as exhibits 11, 13 and 37, which declaration and letters were examined by Dr. Piper for the plaintiff, and drawings made of the same with the aid of a microscope, from time to time thereafter, in the presence of the examiner, until March 19, when the defendant, in disregard of the order of the court, and on contumacious, frivolous and contradictory pretexts, refused to allow a particle of ink to be taken from either of them for examination by the expert under the microscope so as to ascertain the character and kind of the same; and particularly that used in writing the declaration which the defendant alleges was written in the plaintiff's office, or to produce said declaration or any of said five letters on the hearing in court for examination by the judges, except the ones known as exhibits 16 and 37, which were submitted to the court near the close of the hearing for the purpose of determining a comparatively immaterial question relative to the testimony of one of the expert witnesses of the plaintiff. Nor did she produce any of such writings before the examiner after March 19,—although their production was thereafter repeatedly and specially demanded by the plaintiff for the inspection of others of his expert witnesses, and particularly to enable counsel effectually to cross-examine the witnesses of the defendant who swore to their genuineness from a private inspection of them, made out of court while they were in her exclusive possession and control. (See 10 Sawy. 635, 666).

In considering the question of the genuineness of these writings, weight must be given to the fact of the defendant's refusal to submit them to the tests and criticism which the law properly allows, as a means of ascertaining the truth thereabout. (2 Whart. Ev., sec. 1266, 1267). The defendant alleges in her answer that this declaration is genuine, and in her testimony she swears that the letters are of the same character, while on the hearing of the cause she refuses to submit them to the criticism of counsel and the inspection of the court. This singular conduct can only be

1885.]

Opinion of the Court—Deady, J.

interpreted as an admission that such inspection would tend to prove their falsity.

Notwithstanding the plea in abatement was overruled, the defendant in her answer formally denies that the plaintiff is a citizen of Nevada, and repeats the allegation that he is a citizen of California; and on the examination took testimony in support thereof, including the cross-examination of the plaintiff.

And on the hearing, counsel insisted on again raising the question and having it determined *de novo*, on the pleadings and testimony now before the court. But the court declined to reconsider the question or to hear argument on the subject, for the following reasons: 1. In the due and orderly course of proceeding in the case, the question was made and disposed of on the plea to the jurisdiction; 2. No attempt was made to obtain a rehearing on the plea or to take evidence in support of it, but the action of the court in overruling it was acquiesced in, and the case proceeded with on the theory that, for the purpose of this suit, at least in this court, the question of the citizenship of the plaintiff was settled; and 3. Because, in my judgment, the ruling and action of the circuit judge in the premises was in all respects legal and right.

But on the argument, counsel also called attention to the evidence taken by the defendant on this point and insisted that the same was contradictory of the plaintiff's testimony, and so far affected his credibility unfavorably.

A witness may be discredited by showing that on a former occasion he made a statement inconsistent with his testimony in the case on trial, provided such statement is material. (1 Whart. Ev. sec. 557).

But the contradiction by one witness of the statement of another does not necessarily impeach or affect the credibility of either. The contradiction may arise from mistake, ignorance, want of memory, difference of opinion, or other cause consistent with the integrity of both witnesses.

So in this case, admitting that there are conflicting or contradictory statements in the evidence on the subject of the plaintiff's citizenship, it does not follow that his testimony is untrue or that he is at all discredited thereby.

Opinion of the Court—Deady, J.

[December,

Of course, if the court finds that any witness has willfully or even recklessly sworn to an untruth, it will apply the maxim, *Falsus in uno, falsus in omnibus*, and treat him accordingly. But the mere fact that the witness is contradicted does not impeach or discredit him, and the effect may be to discredit the contradicting witness.

But there is nothing in the evidence taken by the defendant that contradicts or impugns the statement of the plaintiff that he is and has been a citizen of the state of Nevada since 1864.

“Citizenship” and “residence,” as has often been declared by the courts, are not convertible terms. (*Parker v. Overman*, 18 How. 141; *Robertson v. Cease*, 97 U. S. 648; *Grace v. American Central Ins. Co.*, 109 id. 283; *Prentiss v. Barton*, 1 Brock. 389).

Citizenship is a *status* or condition, and is the result of both act and intent. An adult person cannot become a citizen of a state by simply intending to, nor does any one become such citizen by mere residence. The residence and the intent must co-exist and correspond; and though, under ordinary circumstances, the former may be sufficient evidence of the latter, it is not conclusive, and the contrary may always be shown. And when the question of citizenship turns on the intention with which a person has resided in a particular state, his own testimony, under ordinary circumstances, is entitled to great weight on the point.

In this case, the plaintiff, admitting his residence in San Francisco for the greater portion of the time for some years before the commencement of this suit, swears that he never intended to become a citizen of California or cease to be a citizen of Nevada.

It is admitted, that in 1864 he removed from California to Nevada and became a citizen thereof, and that in 1873 his family, after a short sojourn in Europe, took up their residence in San Francisco; that in 1875 he was elected United States senator from Nevada, and his wife died, since when he has lived at the Palace, in this city, a greater portion of the time; and that he has large business interests and property in both California and Nevada. But it also appears

1885.]

Opinion of the Court—Deady, J.

that in 1880 he was seeking a re-election to the senate from the state of Nevada; and that he has never registered, voted, sought or held any office or claimed or exercised any political right or privilege in this state since his removal to Nevada, in 1864. In all these respects his conduct squares with and strongly corroborates his testimony as to the intention with which he has resided in this state.

Nor do the statements made by him as a witness in *Boland v. Sharon* show anything to the contrary of this. That was a suit in a justice's court in this city, commenced on June 22, 1877, on an open account for brokerage, alleged to have been earned by the assignor of Boland, on September 9, 1873. To avoid the defense of the lapse of time, there was an allegation in the complaint that Sharon was absent from the state for more than two years between these dates. On the trial, Sharon testified in effect that he was not absent from the State for that time during that period, and judgment was given in his favor. And if Sharon had been a citizen of New York, or an English subject, commorant in San Francisco for the same period, he might truthfully have made the same statement. His citizenship was not involved in the question, and the only matter in dispute was the simple fact whether he was personally present in the state any two years between September 9, 1873, and June 22, 1877, so that he could have been personally served with process therein.

The evidence only proves that the plaintiff was generally an inhabitant of this city for a few years before the commencement of this suit. But when we consider that the plaintiff swears positively that he never intended to become a citizen of this state, and that no act of his while here is inconsistent with such purpose; and when we consider further that Nevada is, and has been, a favorite mining ground for California capitalists and operators, and that San Francisco is the business and social center of the one state as much as the other, the mere fact of the plaintiff's bodily presence here, for one or ten years, under the circumstances, is of very little moment in determining his citizenship. Many citizens of Connecticut and New Jersey doubtless do

Opinion of the Court—Deady, J.

[December,

business in New York, the great commercial and social center of that region, and practically reside there, but without becoming citizens of the state, for the reason that they are not there with any such purpose or intention.

Nor, in my judgment, is this well-established rule materially modified by section 1 of the fourteenth amendment, the first clause of which declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

Prior to the adoption of this amendment, strictly speaking, there were no citizens of the United States, but only of some one of them. Congress had the power "to establish an uniform rule of naturalization," but not the power to make a naturalized alien a citizen of any state. But the states generally provided that such persons might, on sufficient residence therein, become citizens thereof, and then the courts held, *ab convenienti* rather than otherwise, that they became *ipso facto* citizens of the United States. (Story on Cont., sec. 1693; *Prentiss v. Barton*, 1 Brock. 391.)

But the amendment declares the law positively on the subject, and reverses this order of procedure, by making citizenship of a state consequent on citizenship of the United States. For, having declared what persons are citizens of the United States, it does not stop there, and leave it in the power of a state to exclude any such person who may reside therein from its citizenship, but adds, "and such persons shall also be citizens of the state wherein they reside."

But certainly it was not the intention of the amendment to make any citizen of the United States a citizen of any particular state against his will, in which the exigencies of his business, his social relations or obligations, or other cause, might require his presence for a greater or less length of time, without any intention on his part to become such citizen.

The better opinion seems to be that a citizen of the United States is, under the amendment, *prima facie* a citizen of the State wherein he resides, and cannot arbitrarily be excluded therefrom by such state, but that he does not become a citi-

1885.]

Opinion of the Court—Deady, J.

zen of the state against his will, and contrary to his purpose and intention to retain an already acquired citizenship elsewhere. The amendment is a restraint on the power of the state, but not on the right of the person to choose and maintain his citizenship or domicile, but it protects him in the exercise of that right by making him a citizen of that state in which he may choose to reside with such intention.

In *Robertson v. Cease*, 97 U. S. 648, the court held that, for the purpose of giving jurisdiction to the circuit court, an allegation that a party is a resident of a particular state is not equivalent to an allegation that he is a citizen thereof, for the reason, as suggested by Mr. Justice Harlan, that, even under the amendment, mere residence in a state does not necessarily or conclusively prove one to be a citizen thereof. And if an allegation of residence in a state is not necessarily, even under the amendment, the equivalent of an allegation of citizenship, then the mere fact of residence in a state is not necessarily the equivalent of citizenship.

One other question remains to be disposed of before passing to the consideration of the genuineness of the alleged declaration of marriage, and that is the effect of the finding and adjudication of the superior court in *Sharon v. Sharon*.

At the first blush, I was of the impression that this suit having been first commenced, neither the right to maintain it, nor the determination of any question involved therein, could be affected by any finding or judgment in the case of *Sharon v. Sharon*. But on further reflection and examination of the authorities I am satisfied that the law is otherwise as to the effect of the finding or judgment. It matters not in which suit the subject of the controversy or any question involved therein is first determined, the result may be set up as a bar or estoppel, as the case may be, against the further litigation of the same matter in the other. The maxim *Interest reipublicæ ut sit finis litium*, equally applies. (See *Bellinger v. Craigue*, 31 N. Y. 354; *Gates v. Preston*, 41 Id. 113; *Casebier v. Moury*, 55 Pa. St. 419; Bigelow on Estop. 590.)

A judgment on the merits in an action on a claim or demand is a bar to another action thereon between the same

Opinion of the Court—Deady, J.

[December,

parties or their privies, and concludes them as to all matters which appear on the face of the judgment to have been determined, or which were actually and necessarily included therein, or necessary thereto. (Code Civ. Proc., sec. 1911.) But where the actions are not on the same claim or demand, a judgment in the one is only an estoppel in the other as to a matter involved therein and actually found and determined thereby. (*Outram v. Morewood*, 3 East, 346; *Cromwell v. County of Sac.* 94 U. S. 351; *Davis v. Brown*, Id. 427; *Russel v. Place*, Id. 608; *Beloit v. Morgan*, 7 Wall. 622.)

This suit and the action of *Sharon v. Sharon* are not brought on the same claim or demand. The subject-matter and the relief sought are not identical.

This suit is brought to cancel and annul an alleged false and forged writing, and enjoin the use of it by the defendant to the prejudice and injury of the plaintiff, while the other is brought to establish the validity of said writing as a declaration of marriage, as well as the marriage itself, and also to procure a dissolution thereof, and for a division of the common property, and for alimony.

But the validity and genuineness of this declaration of marriage were directly involved in the action of *Sharon v. Sharon*, and determined in favor of the same by the finding and judgment therein. The plaintiff is therefore estopped to show the contrary in this suit unless the effect of that judgment, as an estoppel in this case, has been obviated by the appeal therefrom to the supreme court, and the pending motion for a new trial.

There is some confusion and contradiction in the language and ruling of the authorities on this point. But this arises largely from the fact that the difference in the original mode and effect of reviewing a judgment in an action at law and the decree of a court proceeding according to the civil law, as a court of chancery or admiralty, is often, latterly, overlooked.

A judgment in an action at law could only be reversed and annulled for error appearing on its face. For this purpose a writ of error issued out of the court above, to bring

1885.]

Opinion of the Court—Deady, J.

up the record for examination. This was considered a new action to annul and set aside the judgment of the court below ; and if the writ was seasonably sued out and bail put into the action, it was a *supersedeas*, so far as to prevent an execution from issuing on the judgment, pending the writ of error, but left it otherwise in full force between the parties, either as a ground of action, a bar, or an estoppel. (2 Bac. Abr. 87; 3 Black, 406; *Railway Co. v. Twombly*, 100 U. S. 81.)

But in the equity and admiralty courts the remedy for an erroneous decree is an appeal, which removes the whole case into the court above, for trial *de novo*. There is no decree left in the lower court, and pending the hearing on appeal there is no decree in the case, and there can be no estoppel by reason thereof.

The tendency during the past half century has been to assimilate proceedings in equity and law cases, and in the states where the modern code prevails, the proceeding by which a judgment is reviewed in the appellate court is generally known as an appeal, although in effect it is more like a writ of error than an appeal.

In this condition of things, the courts of some of the states have held that the effect of an appeal in any case is to suspend the judgment appealed from for all purposes; and that pending the appeal, or during the time in which one may be taken, the judgment is neither a bar nor an estoppel. In others, the courts have regarded the appeal, in cases where the power of the appellate court is confined to the affirmation, modification, or reversal of the judgment, according to the facts found or the things done, as appears from the record, as a mere proceeding for the correction of errors, and have therefore held that the judgment of the court below is in the meantime in full force as a bar or estoppel.

Such was the ruling in the *Bank of North America v. Wheeler*, 28 Conn. 433, in which the court said: "If the appeal is in the nature of a writ of error, and only carries up the case to the court of appeals as an appellate court for the correction of errors which may have intervened in the trial of the case in the court below, and for its adjudication upon the question whether the judgment appealed

Opinion of the Court—Deady, J.

[December,

from should be affirmed, reversed, or modified, and that court has no other powers or duties than to affirm, reverse, or modify that judgment, or remit the case to the inferior tribunal, that it may conform its judgment to that of the appellate tribunal, then such appeal . . . does not vacate or suspend the judgment appealed from; and the removal of the case to the appellate court would no more bar an action on the judgment than the pendency of a writ of error at common law, when that was the proper mode of correcting errors which may have occurred in the inferior tribunal. That such an action would not be bound by the pendency of such a proceeding is well settled. The judgment below is only voidable." This case is cited and followed in *Rogers v. Hatch*, 8 Nev. 35, and *Cain v. Williams*, 16 Id. 426.

But the law of California on this subject is the law by which this court must be governed. By the act of 1790, 1 Stat. 122; R. S., sec. 905, congress provided that "the records and judicial proceedings" of the state courts "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

The judgment in *Sharon v. Sharon* can have no other effect in this court, as an estoppel, than it would have in a court of the state under like circumstances. (*Mills v. Duryee*, 7 Cranch. 481; *Hampton v. MacConnel*, 3 Wheat. 234; *Thompson v. Whitman*, 18 Wall. 457; Bigelow on Estoppel, 29, note 1.)

By section 946 of the code of civil procedure, it is provided that an appeal "stays all further proceedings in the court below on the judgment . . . appealed from. This, in effect, makes the appeal like a writ of error, a *supersedeas*, and prevents the enforcement of the judgment by execution pending the appeal, but nothing more. But section 1049 of the code goes further and provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until after the time for an appeal has passed, unless the judgment is sooner satisfied."

The effect of this provision appears to be that the judg-

[1885.

Opinion of the Court—Deady, J.

ment in the Court below is only a step in the proceeding to a final judgment in the appellate court in case of an appeal, and otherwise to hold it in suspense as a ground of action or defense in another suit until the time for taking an appeal has passed.

But these provisions of the code are merely the codification of the law as declared by the supreme court of the state under the old practice act, according to which an appeal from a judgment not only stays its execution, but suspends its operation for all purposes: See *Knowles v. Inches*, 22 Cal. 215; *Woodbury v. Bowman*, 13 Id. 634; *McGarrahan v. Maxwell*, 28 Id. 91; Freeman on Judgments, sec. 328; and in *Murray v. Green*, 64 Cal. 369, this rule has been followed since the enactment of the code.

In the leading case of *Woodbury v. Bowman*, which is cited and followed in the latest one (*Murray v. Green*), the opinion of the court was delivered by the senior counsel for the defendant. In speaking of the rejection of a judgment roll in a case then pending on appeal, when offered in evidence in the case under consideration, he says: "We think it was properly rejected; the appeal having suspended the operation of the judgment for all purposes, it was not evidence in the question at issue, even between the parties to it."

It follows that the plaintiff is not estopped by the finding and judgment of the superior court, in *Sharon v. Sharon*, to allege and prove in this case that the declaration of marriage is false and forged.

The junior counsel for the defendant made the point on the argument that the plaintiff was in some way estopped to try this question in this case or in this court, because, forsooth, he had consented that the case of *Sharon v. Sharon* might be remanded to the superior court, and also that it might be assigned to a particular department thereof, and tried by a particular judge therein, without jury.

But how such a simple matter could have such a serious effect is not apparent, and counsel does not make it so. And certainly a mere consent to a matter of procedure in a case cannot have the effect to bind the party thereto never

to litigate any question involved therein in any other case or court. As a matter of public policy, founded on a sense of justice and convenience, a party is bound by the result of litigation to which he is a party, and not because any of the intermediate steps in the proceeding, as the number of the jury or the judge before whom it was tried, were taken with his consent. And, indeed, a judgment by consent is no more binding on the defendant than one regularly obtained against his will. Consent to the entry of a judgment, or any step leading thereto, gives no peculiar or additional force or effect to the result. It is still a judgment, and nothing more.

This disposes of all the collateral and preliminary questions made on the argument by counsel for the defendant, except an objection to sundry portions of the plaintiff's evidence for irrelevancy, which needs no special notice.

Is the alleged declaration of marriage a genuine instrument, or a false and forged one? is the principal question in this case, and I proceed to dispose of it as briefly as possible. Closely related to this, however, is the question of the genuineness of the five "Dear Wife" letters. Originally, they all came from the possession of the defendant, and if either the declaration or the letters appear genuine it is a convincing circumstance in favor of the other, and *vice versa*.

The evidence on this point includes the testimony of experts in handwriting, persons more or less familiar with the plaintiff's writing, witnesses to the existence of the declaration and letters, as far back as the fall of 1881, the acts and declarations of the parties during the alleged existence of these documents, and their testimony given in this case.

Many of the witnesses testified in the case of *Sharon v. Sharon*, and some of them were cross-examined at great length concerning the testimony they gave there. Some of the collateral matters that were prominent topics in that case were omitted in this. For instance, the graveyard charm, the visits to fortune-tellers to get devices to influence the affections of the plaintiff to the defendant, and

1885.]

Opinion of the Court—Deady, J.

practices resorted to by her to that end. Nor was there any evidence in the case tending to show that the plaintiff ever introduced the defendant to any member of his family, or that she was present at the reception given at Belmont by the plaintiff to his daughter Flora, on the occasion of her marriage with Sir Thomas Hesketh; nor did the plaintiff testify as to the nature of his relation with the defendant, further than to deny the genuineness of the declaration, or that she was ever his wife, or ever recognized as such in any way or at any time.

I have carefully considered all the evidence, but it is unnecessary, if not impossible, to speak of it in detail.

And first, the undisputed and undoubted facts of the case are briefly these:

The plaintiff is, and has been for years, a prominent and well known person on this coast. He was born in 1821, and came to California in 1849, and has been in business in this state and Nevada ever since, where he has acquired a fortune that he modestly estimates at five millions of dollars. Early in the fifties he married Miss Mary Ann Malloy in this city. She died in 1875, leaving a son and two daughters, one of whom has since died, leaving three children; and the other is married in England, and the mother of two children. The son is living, and twenty-nine years of age. Since the death of his wife the plaintiff has lived ostensibly as a widower, in rooms at the Palace, of which he is the proprietor.

He is considered a shrewd, active, intelligent, and courageous man of the world, with a liking for public affairs, and between 1875 and 1881 was United States senator from Nevada. In his composition there appears to be a vein of sentiment and love of pleasure that has led him into illicit relations with the sex, and given him the reputation of a libertine.

The defendant appears to be an attractive woman of about thirty-two years of age, but she is not certain as to the year of her birth. She was born in Missouri, and lost her parents, as I infer, when she was quite young. She went to school at a convent for some time, but she cannot

Opinion of the Court—Dedy, J.

[December,

state how long. She came to this state in 1871, where she has relatives, with her brother, and lived with them for eighteen months or two years. From 1873 to 1875 she lived at the Grand hotel with her brother, after which she lived some time with a relative. Then she kept house for a time with her brother, when she returned to the Grand, where she remained until the opening of the Baldwin in 1877, when she removed thither. In the spring of 1880 she went to live at the Galindo hotel, in Oakland, and returned to the Baldwin after the burning of the Galindo, early in September of the same year; but removed to the Grand about the last of the same month, where she remained until December 6, 1881, when she was expelled therefrom by order of the plaintiff.

The Grand has been owned by the plaintiff since prior to 1880, and is connected with the Palace by a bridge across the street which separates them.

Not much light is thrown by the evidence upon the defendant's occupation or associations during these ten years. She appears to have received some thousands of dollars from her guardian in Missouri, which I infer came from her mother's estate. Between 1878 and 1880 she was engaged in stock speculations. In 1878-79 her account at the Bank of California showed cash deposits to her credit of over sixteen thousand dollars, of which sum only eleven dollars was left to her credit in February, 1880, and she owed a bill at the Baldwin of three hundred and thirty-nine dollars. .

During the latter part of this ten years she had a serious love affair with a prominent lawyer of San Francisco, which culminated on May 10, 1880, in an attempt to commit suicide in his office by taking poison, from the fatal effect of which she was only saved by the prompt use of the stomach-pump.

Some time in 1880, and after May 10, she made the acquaintance of the plaintiff in some casual way, on the street or in the Bank of California, as a large stock dealer, which resulted in his calling on her at the Baldwin and she calling at his office over the bank, though it is not at all certain, even from the testimony of the defendant, which called first.

1885.]

Opinion of the Court—Deady, J.

On September 25, 1880, the plaintiff sent her a note from the Palace to the Baldwin asking for a meeting with her elsewhere than at the latter place. So far as appears, this is the first written communication that ever passed between the parties, and she swears that the plaintiff sent her two other notes of like import on the same day. The following is a copy of the only one produced:

[Exhibit 21.]

“SAN FRANCISCO, Sept. 25, 1880.

“*My Dear Miss Hill*—Can you meet me this evening, say about five o'clock, in the parlors of the Grand Hotel? Something I want to tell you of interest to yourself. Will not do to meet you at the Baldwin; so, if you cannot see me at the Grand, name place and hour. Very truly,

WM. SHARON.”

A fac-simile of this letter is given in the appendix.

On September 29th the defendant, at the request of the plaintiff, went to the Grand to live, where she was known as Miss Hill, the plaintiff paying her a stipend of about five hundred dollars a month, and allowing her to visit his rooms in the Palace privately, and occasionally inviting her there to take a meal with him.

On December 5, 1880, the defendant wrote, and the plaintiff signed and delivered to her an agreement, of which the following is a copy: “One hundred shares of Belcher, held for Miss Hill, at two hundred dollars a share, to be paid on delivery. W. Sharon. Dec. 5, 1880.”

Some time in the fall of 1881 the plaintiff accused the defendant of purloining some of his Belcher-mine papers and revealing his business secrets and private affairs to other persons, which she denied at the time, but now admits that after she left the Grand she found the papers in one of her trunks, and that she has not returned them. For this and other reasons the plaintiff appears to have been desirous of terminating his relations with the defendant, and accordingly, on November 7, he effected an arrangement with her by which, in consideration of a receipt in full of all demands, and a promise not to trouble him any more, he gave

Opinion of the Court—Deady, J.

[December,

her the sum of seven thousand five hundred dollars, as follows: Cash, three thousand dollars; by note, payable, August 1, 1882, one thousand five hundred dollars; and by an agreement to pay her two hundred and fifty dollars a month during the year 1883.

On November 19 the business manager of the Grand hotel, by direction of the plaintiff, sent the defendant the following note:

“Miss, S. A. Hill: Dear Madam—As we wish to otherwise occupy room 208 on December 1, prox., you will please select another residence and give up possession on that date, and much oblige. Yours, S. F. THORN.”

The defendant did not vacate the room as required, and on December 5 the door was taken off the hinges, but at her request she was permitted to stay until the next morning, when, still not making any movement to leave, the carpets were taken up, and she was informed by the servants that if she didn't go they had orders to put her out, and she left on the evening of December 6.

Between the time of receiving the notice to quit and her final departure from the hotel, the defendant wrote three letters to the plaintiff, of which the following are copies:

“Mr. Sharon—I received a letter from Mr. Thorn in regard to my room. Of course I understand it is written by your orders, for no human being can say aught of me except with regard to yourself. Now, Mr. Sharon, you are wronging me; so help me God, you are wronging me. I am no more guilty of what you have accused me than some one who never saw you; and would you, who wished me to come to this house, whom I have been up with nights, and waited on and cared for, and would have done anything to help you, be the one to wrong and injure me?—a man whom the people have placed enough confidence in his honor to put him in the United States senate, to stoop to injure a girl, and one whom he has professed to love.”

“My Dear Mr. Sharon—I cannot see how you can have any one treat me so. I, who have always been so good and kind to you. The carpet is all taken up in my hall. The

1885.]

Opinion of the Court—Deady, J.

door is taken off and away, and it does seem to me terrible that it is you who would have it done. I met Mr. Thorn in the hall as I started to come over to see you, and asked him if he had ordered such a thing done, and he said that I must move out; that it was your wish. I told him that I had written you a note when I received yours, and told you if you wished me to go to send me word, for it was not *convenient* to get the place I wanted until some time this month. He said that you had told him to see that I went, so I said no more, but came over to see you. Oh, senator, dear senator, don't treat me so! Whilst every one else is so happy for Christmas, don't try to make mine so miserable. Remember this time last year; you have always been so good; you don't act so. Now, let me see you and talk to you; let me come in after Ki has gone, if you wish, and be to me the same senator again. Don't be cross to me; please don't. Or may I see you, if only for a few minutes? Be reasonable with me, and don't be unjust. You know you are all I have in the world, and a year ago you asked me to come to the Grand. Don't do things now that will make *talk*. You know you can find no fault with me. May I see you for a few minutes, and let us talk reasonably about all this. I know you will. I know it is not in your nature to be so hard to one that has been so much to you, and don't be unjust. Say I may see you."

"*My Dear Mr. Sharon*—I have written you two letters and received no reply, excepting to hear that they have been read and commented upon by others than yourself. I also heard you said you were told that I said I could and would give you trouble. Be too much of a man to listen to such talk, or allow it to give you one moment's thought. I have never said such a thing, nor have I had such a thought. If no woman ever makes you any trouble until I do, you will go down to your grave without the slightest care. *No, Mr. Sharon, you have been kind to me. I have said I hoped my God would forsake me when I ceased to show my gratitude.* I repeat it. I would not harm one hair of your dear old head, or have you turn one restless night upon your pillow through any act of mine. If you are laboring under a mis-

take, and not bringing the accusation for the purpose of quarreling with me, the time will come when you will find out how you have wronged me, and I believe you too much of a man at heart not to send for me and acknowledge it to me. But in your anger you are going to the extreme; I mean by calling Thorn, or any of your relatives, or outsiders, and letting them know your anger. It simply gives them an opportunity of saying ill-natured things of me, which are unnecessary. Mr. Sharon, I have never wronged you by word or act, and were I to stay in this house for a thousand years, I would never go near your door again until you felt willing to say to me you knew you had spoken unjustly to me. You once said to me there was no woman who could look you in the face and say, 'William Sharon, you have wronged me.' If that be the case, don't let me be the first to utter the cry. I had hoped to always have your *friendship* and best will throughout life, and always have your good advice to guide me, and this unexpected outburst and uncalled for action was undeserved. If you would only look at how absurd and how ridiculous the whole thing is, you surely would act with more wisdom. Why should I do such a thing? What have I to gain by doing so? Pray give me credit for some little sense. I valued your *friendship* more than all the world. Have I not given up everything and everybody for it? One million dollars would not have tempted me to have risked its loss. I feel humiliated to death that Thorn or any one should have it to say I was ordered out of the house. I have a world of pride, and I ask you to at least show me the respect to let Thorn have nothing more to do or say in the affair. I have always been kind to you, and tried to do whatever I could to please you, and I hope, at least, in your unjust anger, you will let us *apparently part friends*, and don't do or say anything that could create or make any *gossip*. Think how you would like one of your daughters treated so. If you have any orders to give, or wish to, make them known in any other way than through your servants or through Thorn. Don't fight me. I have no desire or wish in any way to be unkind to you. I have said nothing to any one about the letter I

1885.]

Opinion of the Court—Deady, J.

have received, nor do I even wish to speak to Thorn on the subject. You have placed me in a strange position, senator, and all the pride in me rebels against speaking upon the subject. As ever,

A."

To these letters the plaintiff vouchsafed no answer.

During the defendant's residence in the Grand, the plaintiff was often absent from the city, and in the early part of 1881 was in Washington city some months; and it was not generally known or understood among the servants and guests of the hotel that she frequented the plaintiff's rooms, or that she remained there at night.

The plaintiff admits that in the fall of 1881 she secreted herself in the plaintiff's rooms and witnessed him and a woman undress and go to bed together, and that she related the adventure to the seamstress of the hotel and others, with laughter, as something very funny.

When the defendant left the Grand she remained in San Francisco, going first to the house of a negro woman on Mary street, Martha Wilson, and afterward keeping house, and then boarding at several places.

The plaintiff never visited the defendant after she left the hotel, but in the summer of 1882 she appears to have visited him at the Palace, and in August of that year she wrote him a letter, of which the following is a copy:

"*My Dear Senator*—Won't you try and find out what springs those were, you were trying to think of to-day, that you said Mr. Main went to, and let me know to-morrow when I see you? And don't I wish you would make up your mind, and go down to them with Nellie and I, wherever they be, on Friday or Saturday? We all could have such nice times out hunting and walking, or driving, these lovely days in the country. The jaunt or little recreation would do you worlds of good, and *us girls* would take the best care of you and mind you in everything. I wish we were with you this evening, or you were out here. I am crazy to see Nell try and swallow an *egg in champagne*. I have not told her of the feat I accomplished in that line, but I am just waiting in hopes of seeing her some day go through the

Opinion of the Court—Deady, J.

[December,

performance. As I told you to-day, I am out to Nellie's mother's for a few days, 824 Ellis street. What a lovely evening this is, and how I wish you would surprise us two *little lone birds* by coming out and taking us for a moonlight drive. But gracious me, it's too nice to think of; but I really wish you would. 'Twould do you good to get out of that stupid old hotel for a little while, and we'd do our best to make you forget all your business cares and go home feeling happy. A."

Early in 1883 she went to the Palace to visit the plaintiff, taking with her Nellie Brackett, the "Nellie" of the foregoing letter, a young girl whom she had had about her since the summer of 1882 as a sort of dependent companion, but she was expelled therefrom by his order. Soon after Nellie Brackett wrote and sent a letter to the plaintiff, which she swears she wrote at the defendant's dictation; but the latter says Nellie wrote it "out of her own head," and then told her of it. The following is a copy of the letter:

"*Old Sharon*—When I first met you I felt quite honored to think I had on my list of acquaintances a United States senator, but to-day I feel it a double disgrace to know you. If you are a specimen of the men that are honored by the title of rulers of our country, then I must say that I pity America, for a bigger coward or upstart of a gentleman never existed, in my opinion, since last Thursday night. I was present with the lady who called on you, and to think of what a coward you must be, your own conscience would not allow you to see her and politely excuse yourself, but you must send one of your Irish hirelings to do your dirty work. I hope God will punish you with the deepest kind of sorrow, and make your old heart ache and your old head bend. I am not one to wish evil to people generally, but with all my heart I wish it to you. You did her a mean, dirty trick, and tried in every way to disgrace her—a motherless, fatherless girl—because you knew she leaned on you, and was alone in the world. And a few weeks after, God took from you your much-loved daughter. Be careful that after this disgraceful outrage of Thursday night upon her, God

1885.]

Opinion of the Court—Deady, J.

does not again bring you to grief, or some great misfortune. I hope he will, I hope he will. Instead of trying to hold her up in the world, you have tried every way in the world you can to disgrace her. I should think you would be so ashamed of yourself that you couldn't do enough to atone for the wrong you have done her. I love her, and I just hate you. It is well I am not her, or I would advertise you from one end of the world to the other. But she feels herself so much of a lady that she too tamely submits to your insults. Why, you are not good enough for me to wipe my shoes on, much less her. If you knew how insignificant you looked to-day, although I, a poor girl, and you could ride in your carriage. I feel really so much above you that I ask Mr. Dobinson to take my message rather than come in contact with yourself.

"The message of insult which you returned to me by Mr. Dobinson was so farcical that I had to laugh in Mr. Dobinson's face, and ask: 'Don't you think that man crazy?' I am a poor girl, but I feel myself so much better than you—you horrible, horrible man.

"MISS BRACKETT."

No further intercourse or communication is known to have taken place between the parties, and no public declaration or claim concerning the alleged marriage was made until September 8, 1883, when one William Neilson procured the arrest of the plaintiff on the charge of adultery, alleging that he was the husband of the defendant, and soon after published a "Dear Wife" letter, the original of which has never been produced, and also the alleged declaration of marriage, to cancel which this suit was thereupon brought.

The defendant's account of the execution of the declaration of marriage and the intercourse between herself and the plaintiff, which preceded it, is substantially as follows:

In the summer of 1880, and before August 25, by invitation of the plaintiff, she visited him to get points on stocks. During one of these visits the plaintiff proposed to give her five hundred dollars a month to let him "love her"—in other words to be his mistress. She declined the offer and

Opinion of the Court—Deady, J.

[December,

he raised the sum to one thousand dollars, which she also declined, saying: "You are mistaken in the woman. You can get plenty of women that will let you love them for less than that." With that she rose to depart, saying she would not come any more, when the plaintiff put his back against the door, and said she was mistaken, that he was really in love with her and wanted to marry her, when she replied: "If that is what you want we will talk about that."

Nothing more of any moment occurred on this occasion, but whether it was a day or a month before August 25, she is unable to say. However, on that day, she returned to plaintiff's office and accepted his proposition of marriage, without any further preliminaries. Then the question arose as to how they should be married. He wanted the marriage secret, as he had a *liaison* on hand with a woman in Philadelphia, who would make trouble if she heard of it, which might injure his chances for a re-election to the senate from Nevada; and said that under the civil code they could marry themselves privately, by the execution of a writing to that effect, to which she appears to have readily assented.

Thereupon, at his suggestion, she sat down at his table and wrote at his dictation, and at one sitting, the alleged declaration of marriage, which he then signed and returned to her, whereupon, without any more ado, they quietly separated, she going to her lodgings at the Galindo hotel, and he to Virginia, Nevada, where he remained some weeks, without any communication passing between them, until very shortly before the letter of September 25, which he addressed her at the Baldwin. That soon after the receipt of this letter she removed, at the request of the plaintiff, from the Baldwin to the Grand, and continued to live there in room 208 until December, 1881, during which period she was in the habit of visiting the plaintiff in his rooms at the Palace, day and night, and received from him the sum of five hundred dollars a month, with which to pay her bills.

On the other hand, the plaintiff swears positively that he never signed the declaration of marriage; that he never saw or heard of it until it was made public in September, 1883; that he was never married to the defendant in any

1885.]

Opinion of the Court—Deady, J.

way; that he never addressed her as his wife in writing or otherwise; and that he never knew or heard that she made any claim to be his wife until that time.

The originals of the declaration and "Dear Wife" and other letters written by the plaintiff to the defendant not being in his possession, and she refusing to produce them and put them in evidence, he was allowed to put in evidence photographic copies thereof, made from the originals when introduced by her in *Sharon v. Sharon*.

The copies of the letters were put in evidence, against the objection of the defendant, for the purpose of showing that the correspondence between the parties was not such as would naturally pass between husband and wife; and further, for the purpose of showing that the defendant had been guilty of forgery, by changing the address of five of these letters from "My Dear Allie" or "Miss Hill" to "My Dear Wife," for the purpose of supporting and strengthening her claim that the declaration of marriage is genuine, and was signed by the plaintiff.

The declaration is in the words and figures following:

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, Sarah Althea Hill, of the city and county of San Francisco, state of California—age twenty-seven years—do here, in the presence of Almighty God, take Senator William Sharon, of the state of Nevada, to be my lawful and wedded husband, and do here acknowledge and declare myself to be the wife of Senator William Sharon, of the state of Nevada.

" SARAH ALTHEA HILL.

" AUGUST 25, 1880, SAN FRANCISCO, CAL.

"I agree not to make known the contents of this paper or its existence for two years, unless Mr. Sharon himself see fit to make it known.

S. A. HILL.

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, Senator William Sharon, of the state of Nevada, age sixty years, do here, in the presence of Almighty God, take Sarah Althea Hill, of the city of San Francisco, Cal., to be my

Opinion of the Court—Deady, J.

[December,

lawful and wedded wife, and do here acknowledge myself to be the husband of Sarah Althea Hill. WM. SHARON.

“Nevada, Aug. 25, 1880.”

A fac-simile of this document is given in the appendix.

The following are copies of the five “Dear Wife” letters, the one in ink being first, with the letter to Thorn referred to therein:

[Exhibit 13.]

“*My Dear Wife*—In reply to your kind letter, I have written Mr. Thorn and inclosed same to you, which you can read and then send it to him in an envelope, and he will not know that you have seen it. Sorry that anything should occur to annoy you, and think the letter will command the *kind courtesy* you deserve. Am having a very lively and hard fight, but think I shall be victorious in the end. With kindest consideration, believe me, WM. SHARON.”

[Exhibit 38.]

“AGENCY OF THE BANK OF CALIFORNIA, }
“VIRGINIA, NEV., Oct. 16, 1880. {

“*Mr. Thorn: My Dear Sir*—I gave Miss Hill a note to you, and expected the kind consideration for her which she deserves; but it seems you have not been as accommodating as you might be. You will consider my wishes in this and allow no cause of complaint. Very truly,

“WM. SHARON.”

[Exhibit 29.]

“*My Dear Wife*—Inclosed send you by Ki the balance, two hundred and fifty, which I hope will make you happy. Will call this evening for the joke. Yours, S.

“April 1 (1881).”

[Exhibit 11.]

“*My Dear Wife*—You have had one hundred and twenty; then twenty, and before I left, one hundred. In all, two hundred and forty (240). The balance is just two hundred and sixty, for which find cash inclosed. I am afraid you are getting extravagant. SHARON.

“May 5, 1881.”

1885.]

Opinion of the Court—Deady, J.

[Exhibit 16.]

"*My Dear Wife*—Inclosed find three hundred and ten dollars to pay bills with, etc. W. S.

"August 29, 1881."

[Exhibit 37.]

"PALACE HOTEL, San Francisco, Oct. 3, 1881.

"*My Dear Wife*—Inclosed find five hundred and fifty dollars, which will pay expenses until I get better. Will then talk about your Eastern trip. Am much better to-day. Hope to be up in three or four days. Truly, S."

The following are copies of the three other letters in pencil. The first was written near Christmas, 1880, and the other two in the spring of 1881:

"*My Dear Allie*—Come over and join me in a nice bottle of champagne, and let us be gay before Christmas. W. S.

"If you don't come over and take part in the bottle I may hurt myself."

"PALACE HOTEL, San Francisco, 188

"*My Dear A.*—Come and take dinner. Answer."

"*Miss H.*—Have ordered a nice dinner, and have a sample bottle of wine I want you to try."

In the appendix are fac-similes of the "Dear Wife" letter in ink, and the reproduction of it by the expert, Mr. H. C. Hyde, in the form the plaintiff claims the original was, from which the other was traced; and also of the Thorn letter.

Eight witnesses were examined as to the genuineness of the signature to the declaration and the "Dear Wife" letters. Three of these—Mr. C. D. Cushman, Mr. Samuel Soule and Mr. M. Gumpel—were called by the defendant.

Cushman did not speak as an expert, but simply as one having a knowledge of the plaintiff's handwriting, obtained during some years spent in his employ.

His general standing and character are not questioned, but it is claimed, and apparently with good reason, that for some cause he has made himself a very bitter partisan in this case of the defendant's from the time it was mooted.

Soule is seventy-eight years of age, and professed to speak as an expert, or a "judge of handwriting," on very slender grounds. His opinion is based on a comparison made out of court with writings not produced or admitted to be the plaintiff's. Both he and Cushman, on these grounds, testify that the writings in question are genuine, but, in my judgment, very little weight ought to be given to the opinion of either of them.

Gumpel is a lithographer and an expert of considerable experience, besides being in some respects a very remarkable penman.

But his relation to the case, and his conduct as a witness therein, are both suspicious and unsatisfactory, and lead me to regard him and his testimony with distrust.

On October 16, 1883, he writes to the attorney of the plaintiff, Mr. Barnes, suggesting that the other side wished to retain him as an expert, but he preferred to be employed by Mr. Barnes, and is anxious to know if he wants him.

Afterward, he was retained by the plaintiff as an expert, and examined the disputed writings prior to the trial of *Sharon v. Sharon*, so far as he had an opportunity. On the trial of that case he was not called as a witness by the plaintiff, because, as he says, he had told Mr. Barnes he could do him no good. Thereafter, according to his statement, he met the defendant's attorney, Mr. Tyler, on the street, with whom he had not spoken for two years, and against whom he had "a great grudge," on account of some former "bad" treatment, who immediately ran up to him, begged his pardon for the past, and asked him to be a witness on his side of the case. To this the witness replied: "I think you have a great deal of audacity to speak to me;" and after some further parley said: "You know how to secure the attendance of a witness;" and added, "If you subpoena me in this case, I give you due warning that I will bust your case higher than a kite. Look out!"

Notwithstanding this friendly warning, which looks as if it was given and received in a Pickwickian sense, Mr. Tyler had the witness subpoenaed, and he went upon the stand and swore that the signature to the declaration was genuine;

1885.]

Opinion of the Court—Deady, J.

and that the "Dear Wife" letters were written by the plaintiff, and were not tracings; which testimony he repeated in this case.

On his examination in chief, the witness was very confident that he could detect any tracings—said he had done so "at the first glance" in the case of *Treadwell v. Bank of California*; but on being asked, on cross-examination, to say which of plaintiff's exhibits, 200 and 201, was the tracing and which was the original—the one being a letter written by the plaintiff on January 5, 1885, to an expert witness, and the other a tracing thereof, made by the latter—he sulked and would not answer; said he would if he had a month to examine them in, and the plaintiff would pay him for his time.

His opinions on the subject of the writings are mere bald assertions, unsupported by any intelligent or convincing reasons. He first pretended that his "method" was a secret, and spoke of it as something unusual and even occult, that he could not explain. But afterwards he was compelled to admit that he had no special "method," but simply compared the one writing with another, and came to a conclusion from their resemblance or dissimilarity, whether they were written by the same person or not.

I repeat that I am constrained to regard his connection with the case with suspicion, and his testimony as unsatisfactory and with distrust. The possibility of his having written the disputed signature himself will be considered further on.

Of the five witnesses called by the plaintiff on this point, Dr. R. M. Piper is the most important. He appears from his own account, and this is corroborated by the work he has done in this case, to be an expert of celebrity, and a microscopist of experience and distinction. After the trial of *Sharon v. Sharon* he was employed by the plaintiff to come here from Chicago and give his time and attention to the examination of the writings in this case, without any understanding as to the amount of his compensation, except that it should be satisfactory to him.

This circumstance has been animadverted on by counsel,

and in considering the credit due to his testimony it cannot be overlooked by the court. Upon this arrangement his compensation may be, and in some degree probably is, contingent upon success. But there is nothing very unusual in this; and until experts are nominated by the court and paid by the state, the circumstance of their being retained by the parties must always be considered in estimating the value of their evidence.

And in this connection it may also be noticed that Dr. Piper, being a comparative stranger here, was on cross-examination very properly asked concerning the antecedent circumstances of his life, and that for some reason he failed to give any account of the same for a period of several years after his majority, and his graduation as a doctor of medicine at Dartmouth college.

Dr. Piper's microscopic work in this case covers a large field. His numerous tables of enlarged drawings or tracings present the characteristics, similarities and differences of these writings plainly and in detail.

With the aid of the *camera lucida* he has made drawings of the disputed signature, portions of the "Dear Wife" letters, and the defendant's letters, the Gumpel imitation of the plaintiff's signature, and his admitted signature to bank checks; and of sundry words, letters, and terminals of each, so as to make apparent to ordinary observation any singularity of formation, feature or proportion, that may serve to distinguish or identify either of them.

Assuming that his observations and delineations are correct, to the contrary of which nothing appears save the surmises and conjectures of counsel, he has accumulated a great mass of material facts, from which any person of ordinary intelligence and power of observation and deduction may draw a comparatively safe conclusion as to the question in dispute—so far, at least, as the same can be determined by an inspection of the writings themselves.

A peculiarity in the formation of a letter or the manner of writing a word, that, under ordinary circumstances, would not be discerned or apprehended, when magnified several hundred times, becomes as noticeable as the features of the human face.

1885.]

Opinion of the Court—Deady, J.

Dr. Piper states that a person in writing usually makes his terminals and *tee* crossings with less care or consciousness than any other part of the word; from which he deduces the conclusion, and a very plausible one, to say the least of it, that a person engaged in making a tracing of another's writing is apt to betray himself, by lapsing into his own habit or style at these points.

The tables of enlarged terminals and *tee* crossings, taken from the admitted writings of the parties, show a very marked difference—those of the defendant being blunt or clubbed at the latter end, while those of the plaintiff are generally lighter and invariably pointed or tapering at the termination. They also show that the terminals and *tee* crossings in the "Dear Wife" letters, are in this respect very like the defendant's and unlike the plaintiff's.

On the whole, Dr. Piper's unqualified conclusion is that the signature to the declaration was not written by the plaintiff, and that it was written by the witness Gumpel; and that the "Dear Wife" letter in ink, and, at least, the word "wife" in the other two, known as exhibits 11 and 37, are tracings made by the defendant.

Besides Dr. Piper, the plaintiff called on this point Mr. H. C. Hyde, Mr. R. C. Hopkins, Mr. J. P. Martin, Mr. J. H. Dobinson, and Mr. F. W. Smith. The latter three are very familiar with the plaintiff's writing. Mr. Martin was in his employ as book-keeper, cashier, and otherwise, for ten or fifteen years. Mr. Dobinson has been his private secretary since 1876; and Mr. Smith has been the paying teller of the Bank of California since 1879, during which time he has probably paid hundreds, if not thousands, of the plaintiff's checks. And from their knowledge of the plaintiff's writing they are decidedly of the opinion, that the disputed signature is not his.

Hopkins has been the keeper of the Spanish archives in the United States surveyor general's office in this state for the past thirty years, and during that time has been much engaged in studying writings with a view to determining the question of their integrity, and making tracings of Spanish grants and documents. He says that he cannot state posi-

tively whether the signature to the declaration is the plaintiff's or not; but he is certain that it was written there before the body of the instrument was, and that the "Dear Wife" letter in ink is a tracing.

Hyde is a well known and experienced expert. He made the tracing on which Gumble declined to give an opinion. On the trial of *Sharon v. Sharon* he said, without having made any special examination of it, that he thought the signature to the declaration genuine, but now, after a thorough examination of the subject, he says he is certain that it is not genuine; and that the "Dear Wife" letter in ink is a tracing with the word "Wife" "built in." And on this latter point his explanation of the matter is *clear* and convincing.

After an examination of the face of the instrument under the microscope, both Hyde and Piper are of the opinion that the signature to the declaration is written in different ink from the body of the instrument, and that the latter was written after the paper had been folded, as shown by the spreading and absorption of the ink where the pen crossed a fold; and this is plainly indicated by the enlarged drawings prepared by the latter.

On the whole, the expert testimony, both in skill, character, and numbers, preponderates largely in favor of the plaintive, and proves with as much certainty as such evidence well can, that the signature to the declaration is false and forged, and that the "Dear Wife" letter in ink, and, at least, the word "wife" in the others, are tracings made by the defendant of letters written to her by the plaintiff with the word "wife" substituted for "Miss Hill" or "Allie."

And this conclusion coincides with the impression made on my own mind by the examination of the writings.

The signature to the declaration is a good general imitation of the plaintiff's, and without special observation, might easily pass for his. The signature of the plaintiff is generally well marked and uniform, but often varies in minor particulars. Perhaps none of the hundreds of them offered in evidence is more unlike the disputed one than

1885.]

Opinion of the Court—Deady, J.

the signature on the check of the same date with the declaration.

The *a* in the check signature is closed at the top, while in the other it is open; and the lower limb of the *aitch* in the former leaves the stem at the line, while in the other it returns on the stem, or follows it upwards for some distance. But in other signatures of the plaintiff these differences from the disputed signature do not appear—at least, not so plainly. But in the disputed signature the *ess* in Sharon is nearly a third longer than the *aitch*, but no such difference or peculiarity appears in any of the plaintiff's admitted signatures. On the contrary, the *aitch* in all of them that I have seen, is fully as long, and sometimes longer, than the *ess*. Again: the up-strokes of the *double-u* in the plaintiff's signature, and particularly the second one, are uniformly heavier than the down-strokes, whilst in the disputed one the contrary is the case.

And besides, and over and above all these particulars, there is a difference in the general effect and appearance of the signatures that is more readily felt than expressed.

One may see at a glance that two pictures, which have a general similarity, are not portraits of the same person, when it might be difficult to give a satisfactory reason for the conclusion. The disputed signature is evidently the work of a skillful penman. The lines are comparatively smooth and steady, while the exact contrary is characteristic of the plaintiff's writing. Indeed, I very much doubt if he could write such a signature as the one to the declaration.

The difference between the two signatures is more fully shown by the fac-simile of them in the appendix.

And the difference between the disputed signature and the genuine signatures of the plaintiff generally, and particularly the comparative length of the *ess* and *aitch*, is shown on the fac-simile in the appendix which contains the disputed signature—the eighth from the top in the left-hand column—and twenty-one others taken from the plaintiff's checks.

Who did write this disputed signature it is not absolutely

necessary to decide. So far as the evidence goes, it was not written by the plaintiff, and may have been written by the witness Gumpel. Dr. Piper, speaking as an expert, says he did write it. He denies it; but it may nevertheless have been done by him, not feloniously, but as an idle fancy or aimless experiment. For whoever wrote it, I think there is nothing in this case more evident and certain than that this signature was not written after this declaration, but before it, and therefore with no apparent wrongful intent.

In the fall of 1883, and while Gumpel was understood to be in the employ of the plaintiff as an expert, he wrote from memory in Captain Lee's office the signature of the plaintiff, with the *addenda*, "Nevada, Aug. 25, 1880," which is much more like the signature to the declaration than any of the plaintiff's admitted signatures. A fac-simile of both these writings may be found in the appendix. A glance at it will satisfy any one that Gumpel could have written the disputed signature if he would, and if for any reason he should undertake to imitate the plaintiff's signature, the result would appear just as it does on this declaration.

And so far as the genuineness of these disputed writings depends on the testimony of the parties, the preponderance of the evidence is with the plaintiff. In any view of the matter, the testimony of the plaintiff neutralizes that of the defendant. Whatever deductions may be made from his credibility on account of his participation in this transaction and interest in the result, must also be made from hers, and even more, for in the very nature of things this is a game in which the woman has more at stake than the man. And however unfavorably the plaintiff's general character for chastity may be affected by the evidence in this case, it must not be forgotten that, as the world goes and is, the sin of incontinence in a man is compatible with the virtue of veracity, while, in the case of a woman, common opinion is otherwise. Nor is it intended by this suggestion to palliate the conduct of the plaintiff or excuse the want of chastity in the one sex more than the other, but only, in estimating the relative value of the oaths of these parties, to

1885.]

Opinion of the Court—Deady, J.

give the proper weight to the fact founded on common experience, that incontinence in a man does not usually imply the moral degradation and insensibility that it does in a woman.

And it must also be remembered that the plaintiff is a person of long standing and commanding position in this community, of large fortune and manifold business and social relations, and is therefore so far, and by all that these imply, specially bound to speak the truth, and responsible for the correctness of his statements; and all this, over and beyond the moral obligation arising from the divine injunction, not to bear false witness, or the fear of the penalty attached by human law to the crime of perjury. On the other hand, the defendant is a comparatively obscure and unimportant person, without property or position in the world. Although apparently of respectable birth and lineage, she has deliberately separated herself from her people, and selected as her intimates and confidants doubtful persons from the lower walks of life, and, so far as appears, is only amenable to legal punishment for any false statement that she may make in this case, which all experience proves is not sufficiently certain to prevent perjury in legal proceedings.

And by this, nothing more is meant than that while a poor and obscure person may be naturally and at heart as truthful as a rich and prominent one, and even more so, nevertheless, other things being equal, property and position are in themselves some certain guaranty of truth in their possessor, for the reason, if none other, that he is thereby rendered more liable and vulnerable to attack on account of any public moral delinquency, and has more to lose if found or thought guilty thereof than one wholly wanting in these particulars.

But this is not all. There is much in the testimony of the defendant in this case that must affect her credibility unfavorably. It is full of reckless, improbable, and in some instances undoubtedly false statements.

Take this one, for illustration: The story that some time in 1880, and prior to the date of the alleged marriage, she

gave the plaintiff seven thousand five hundred dollars to invest in stocks for her, is undoubtedly false; and she has attempted to support it, not only by perjury, but by forgery.

Perceiving that the payment to her, under the circumstances, of that large sum, shortly before she left the plaintiff's hotel, bore upon its face the evidence that it was given to a discarded mistress rather than a deserted wife, she deliberately swore, both in *Sharon v. Sharon* and in this case, that the transaction was a return to her of that amount which she had put into the plaintiff's hands some eighteen months before for investment; and not only that, but she produced on the trial in the former case, to support her statement, a writing to that effect, purporting to be signed by the plaintiff and witnessed by Nellie Brackett. But when asked, on cross-examination, to produce that paper here, she declined to do so or to answer any question about it. And Nellie Brackett swears that the writing was manufactured by the defendant—that she copied the signature of the plaintiff from one in an autograph album, and that she witnessed it at the defendant's request, upon an understanding that it was only to be used to influence her lawyers, and the defendant afterwards quarreled with her because she would not go on the stand and swear to it.

And while it may not be safe to accept any statement on the uncorroborated testimony of this young woman, the innate improbability of the defendant's story and her refusal to produce the paper, or answer concerning it, is ample corroboration.

And in a suit brought by the defendant against the plaintiff in the superior court, in May, 1884, on the agreement given in part payment of this sum of seven thousand five hundred dollars, to recover the installments due thereon for October, November and December, 1883, amounting to seven hundred and fifty dollars, it was found by said court, sitting without a jury, that said writing was given to the defendant on November 7, 1881, "in consideration of past illicit intercourse between them," and also in consideration of a written receipt and promise to the plaintiff by the defendant "to make no further demand upon him, and not further to annoy him in any manner."

1885.]

Opinion of the Court—Deady, J.

And while it is possible that, notwithstanding the falsehood of the defendant in this and other respects, the alleged declaration may be genuine, it must be conceded that neither that fact nor any circumstance tending to prove the same can be established by her uncorroborated oath.

Another circumstance strongly contradictory of the defendant's account of this transaction is the fact that nearly a year after the pretended advance, and before its alleged return, she deliberately obtained from the plaintiff a contract to hold one hundred shares of Belcher for her, to be paid for on delivery. Now, if the plaintiff then owed the defendant seven thousand five hundred dollars, which, according to her account, had also been advanced to him for the very purpose of being invested in stocks, why hold these stocks for payment absolutely? Why not credit her on the contract with the amount due her from the seller, and agree to deliver on payment of the balance of two thousand five hundred dollars? or what would be more natural still, why not deliver her stock at once for the amount due her?

Nor is this transaction, viewed in any light, the kind of intercourse we might expect between a fond old millionaire and his darling young wife in the fourth moon of their marriage.

It follows that, on the testimony of the parties, as well as that of the experts, the decided weight of the evidence is against the genuineness of the declaration and letters.

And now let us see what the evidence is on the face of these documents, as to their genuineness or falsity.

Of the many circumstances that might be mentioned under this head, a few of the most striking must suffice.

The declaration is written on note paper instead of legal cap, although written in an office well supplied with stationery for business purposes. It is written on the first half-sheet instead of a whole one. It begins at the top line of the second page instead of the first one, and is finished back on the unruled space at the top of the latter. The signature of the plaintiff is on the top line of the first page, where it might have been written as an autograph or imitation, or

even without any purpose; and considered as a signature to a legal instrument, has the unusual and unmeaning appendage, "Nevada, Aug. 25, 1880," and this although that date, and the fact that the alleged signer was of Nevada, was already stated three times in the body of the writing.

It is full of verbose formalisms and useless repetitions, and in structure and verbiage is just what might be expected from a stylish, half-educated woman, and is altogether unlike what might be expected from the dictation of a person of experience, brevity and directness, such as the plaintiff appears to be. The last four lines are written much closer than the others, and the words contained in them are crowded together, and two of them abbreviated. And even then there was barely room for the matter without trenching on the signature, after omitting certain words and parts thereof—nineteen in number—which were used in corresponding and foregoing parts of the instrument.

Counsel for the plaintiff has called attention to these omissions in his brief by inserting them in red ink. Substituting italics for the red ink, the omissions appear as follows—"the presence of Almighty God, take Sarah Althea Hill, of the city *and county* of San Francisco, *state of California*, to be my lawful and wedded wife, *and* do here acknowledge *and declare* myself to be the husband of Sarah Althea Hill, of the city *and county* of San Francisco, *state of California*."

Taking common experience and observation in such matters as a guide, the most satisfactory inference from the facts on the face of the declaration is, that the body of it was written after and over the signature. I know it was said on the argument, and there is force in the suggestion, that if the instrument was premeditatedly written over a signature, either genuine or false, in a matter of so much moment as this, the writer would most likely have experimented with the subject until the matter was got into such form and number of words as would conveniently fill the space preceding the signature, without stretching, crowding, or omission.

But the conclusion already stated, that the signature was

1885.]

Opinion of the Court—Deady, J.

written before the declaration, is by far the most reasonable inference from the evidence afforded by the document itself; and this cannot be overcome or made doubtful by mere plausible conjecture as to what a prudent and skillful person would or might have done under the circumstances. For this is not the first time in which persons engaged in an illegal or criminal transaction have strangely or foolishly, as it appears to others after the fact, omitted to take some very simple precaution to prevent detection or failure.

The "Dear Wife" letters have nothing wifely about them except the word "Wife" in the address. The four in pencil are short, curt scrawls, announcing the sending of money, presumably on account of her monthly stipend of five hundred dollars, with a jocular remark or familiar expression added, such as a guardian might write to his ward, or an attorney to his client. They are dated in different months, and apparently relate to monthly payments. The one of April 1 says, send you the "balance," two hundred and fifty dollars; and the one of May 5 says, you have had at different times (mentioning them) two hundred and forty dollars; the "balance" is two hundred and sixty dollars, which find inclosed. The "balance" of what? Why, the "balance" of the five hundred dollars a month the plaintiff was paying her on some account. There is not a particle of love or affection in the letters—not even enough to suggest that she was his mistress.

The ink letter is longer and more formal. It was written in reply to one from her soon after she took up her residence in the Grand, in which she had evidently complained that the plaintiff's manager, Mr. Thorn, had not treated her properly. So far as this complaint was well founded, it probably arose from the fact that the manager suspected she was more than a boarder and less than a wife.

But there is nothing wifely in this letter either, except the word "Wife" in the address. The writer hopes that the inclosed letter to Mr. Thorn will command the "kind courtesy," not respect, she deserves, and the letter to Thorn is to the same effect. There is not a particle of love or affection in it from one end to the other. It is such a letter

as the plaintiff might have written to Miss Hill, but hardly to his young bride of less than two months' existence.

And there are some particular circumstances connected with this ink letter which prove it to be a tracing beyond a doubt.

The plaintiff swears that he wrote the original of the ink letter at the same time that he wrote the inclosed one to Thorn, at the agency of the Bank of California in Virginia, and on its paper. The one to Thorn, which passed through the hands of the defendant, shows on its face that it was so written. The two letters were practically one transaction with one person, and were inclosed in one envelope to the defendant. Under these circumstances, the only reasonable conclusion is that they were both written on the same kind of paper.

But it was a difficult and tedious task to trace the lithographic head on this paper, nor is it likely that it was obtainable here. So the tracing was made on plain paper, and on its face betrays its fraudulent origin and furnishes another striking instance of the truth of the proverb, "Murder will out."

The photographic copies of the declaration and letters indicate that the originals are worn and soiled, and the witnesses who have seen them say that such is their appearance.

But this appearance has been put upon them to give color to the assertion that they are originals of some years' existence, which have been carried about and seen hard usage, and particularly were not fresh tracings on new paper. Nellie Brackett swears that the soiling and crumpling process was a part of their manufacture; that the defendant wet them with coffee grounds, and ironed them and held them over the gas, and the like, to give the new smooth paper the appearance of age and use.

Ah Sam, the defendant's Chinese servant, at Laurel place, gives a very graphic account of the process. He says he lived with her "two Christmases ago," and saw her with papers in the kitchen, which she put dirt and coffee on to make them look old and yellow, and that he ironed them for her.

1885.]

Opinion of the Court—Dedy, J.

The defendant's answer to this evidence is, that she buried the documents for safety in a tin can in the cellar, where, strange to say, they got wet, but whether from the sprinkling of the street or a shower, does not appear, and she afterwards ironed them to dry and smooth them. But this does not account for the corners of some of them, and particularly the upper ones of the ink letter, having the appearance of being burned off, as though they had got singed in the gas. And the story indicates that she then had a great deal more concern for the safety of her "papers" than when she left them in a loose roll on the wall behind a picture at Martha Wilson's; and taken altogether it is evidently a weak invention of the defendant's in support of what she knows to be false and forged writings. And thus one falsehood begets another from the beginning to the end of this case.

When compared with the usual and ordinary conduct of married men and women under like circumstances, there is such incongruity and want of harmony between the "Dear Wife" address of these letters and the general tone and subject-matter of them, that they must be, as the plaintiff insists and the evidence already considered is sufficient to show, at least in the one instance, the tracings of a genuine letter, with the word "Wife" substituted for "Miss Hill" or "Allie," and in the others genuine letters in which a like substitution has been made.

But the defendant relies largely in support of her case, on what may be called contemporaneous evidence of the existence of these documents and her own declarations concerning the same and her relation with the plaintiff, to third persons in the nature of *res gestæ*.

For instance, she testifies that she told her uncle, Mr. W. R. Sloan, while she was still at the Grand, that she was secretly married to the plaintiff, because he suspected something wrong and threatened "to break every bone in Sharon's body;" and that she subsequently showed him the declaration and letters at Martha Wilson's house, soon after she left the Grand; that she did not tell her brother or aunt, Mrs. W. J. Bryan, but did tell her grandmother, Mrs. W.

J. Brawley, of the marriage, but at what time does not appear. She also testifies that she told Mary E. Pleasant of the marriage while at the Grand, and soon after she left that place showed her the declaration and letters; that she also showed the declaration to Martha Wilson and read it to her on October 14, 1880, and that Vesta Snow was present and read it at the same time, to whom she also showed the letters after she left the Grand; and that she showed both declaration and letters to Nellie Brackett early in 1882.

Nellie Brackett first met the defendant in the early part of 1882. She was then about seventeen years of age, and the defendant made a sort of a confidant and dependent companion of her. In August, 1882, the defendant went to live at Mrs. Brackett's, where she remained until the middle of November, when she moved elsewhere, taking Nellie with her, against the wishes of her parents, and keeping her so until near the close of the year 1883, when the quarrel took place on account of the latter's refusal to swear to the forged receipt, as already stated.

On the trial of *Sharon v. Sharon* she was called as a witness by the defendant, and testified that she had seen the declaration and letters as early as March, 1882, but on being recalled by the plaintiff, she said her former testimony was false in that respect; and she testifies in this case that she never saw the Sharon letters until June or July, 1883, and there was then no one of them addressed to the plaintiff as "Wife," and she did not see the declaration until sometime after that.

The defendant testifies that in the summer of 1882 she renewed her friendly relations with the plaintiff, and visited him occasionally at his rooms at the Palace, and that at one of these visits she took Nellie with her, and secreted her at night behind the bureau in the plaintiff's room, so that she could see him and her go to bed together, and hear what they said and did while there, with a view of having her testify to the same, if need be; particularly anything that indicated they were married, as she was afraid the defendant might deny the declaration.

1885.]

Opinion of the Court—Dedy, J.

Nellie Brackett now testifies that this story is wholly false; that the defendant concocted it in the fall of 1883, and had her learn it by heart, and go on the stand in *Sharon v. Sharon* and swear to it. For the honor of her sex, I trust she tells the truth about it now; for I would much quicker and rather believe that the defendant was wicked enough to commit perjury than that she or any other woman was vile enough to do such a dirty thing with this young girl.

Martha Wilson is a poor, nervous little negro woman, born a slave, who can neither read nor write. While the defendant was at the Grand she employed her occasionally as a seamstress, and had breakfasts from her restaurant. The defendant made much of her, and sought refuge in her house when she was expelled from the Grand, and was there off and on for some time.

On the trial of *Sharon v. Sharon*, she swore, when called by the defendant, that the declaration was shown and read to her by the defendant and Vesta Snow, at her house on Mary street, on October 14, 1880, when the defendant called for her to go with her to the furniture factory to obtain some special articles for her rooms at the Grand on the written order of the plaintiff of that date. And the testimony of the defendant and Vesta Snow is to the same effect in this case. But Martha Wilson, being recalled by the plaintiff in *Sharon v. Sharon*, testified that she never saw or heard anything of the kind until late in the fall of 1883, when the defendant showed her the declaration and induced her to swear to this falsehood, out of sympathy and a promise of five thousand dollars, and that she took Vesta Snow, who was in her employ at the time, to the defendant, where she was also shown the declaration and induced to swear to this story.

On her cross-examination, when recalled in *Sharon v. Sharon*, she contradicted herself badly, and evidently was made to say what she did not intend and what was not true. But here she tells a lucid, plain story, and explains that on that cross-examination she was so stormed and raved at by Mr. Tyler that she did not know what she was saying.

But it has been shown beyond a doubt that the key-note of this story—the meeting of the parties at Martha Wilson's house on the date of the furniture order—is totally false. Vesta Snow says she went to Martha Wilson's house that day—October 14—at the request of Martha's husband, to ask her to come to the restaurant then kept by her at 644 Mission street; and she remembers the one circumstance by the other, and that Martha Wilson had a restaurant at that place on that day; and so says the defendant. But the landlord and the mechanics, who furnished and fitted up the restaurant, swear, and produce their books of original entry to support their statements, that Martha Wilson did not occupy the place until some time in November, and probably as late as the tenth.

And soon after the trial of *Sharon v. Sharon*, Martha Wilson was indicted in the state court for perjury in denying that she had seen or heard read the declaration as stated by the defendant. Upon this indictment she has since been tried, both the defendant and Vesta Snow being witnesses against her, and found not guilty.

Vesta Snow is a woman of doubtful repute, who has worked for Martha Wilson, and appears to be keeping a cheap lodging-house. She testifies in this case, as in *Sharon v. Sharon*, that she saw and read the declaration at Martha Wilson's house on October 14, 1880; and also that soon after the defendant left the Grand she went one day to San José, and that while she was gone she (Vesta Snow) went to Martha Wilson's, and they took a bundle of the defendant's papers from behind a picture on the wall, and she looked over them and read them "some," and the declaration and sundry "Dear Wife" letters signed "Sharon," and a furniture order of October 14, 1880, were among them.

Now, one item of this statement is undoubtedly false. The defendant obtained the furniture on the order of October 14, 1880, and delivered it to the person in charge, and did not have it in 1881. Mr. Cushman, her witness, swears that he was then in the plaintiff's employ at the factory, and received the order, which, by accident, was not placed

1885.]

Opinion of the Court—Deady, J.

among the factory papers, but kept by him, and that the defendant never saw it again until October 13, 1883. And the rest of the story is too absurd and unreasonable for any credence. For who can believe that the defendant, smarting under her recent expulsion from the Grand, would leave papers of so much importance to her as this declaration and these letters in a loose package, behind a picture on the wall at Martha Wilson's, for Vesta Snow and other busybodies to pry into and meddle with while she was gone to San José? And yet the defendant does not hesitate to back her witness, and swear she left the papers behind the picture as Vesta Snow states, and adds that when she came back she met her uncle there and took him into the dining-room and showed him the documents.

So, then, this kind of contemporaneous evidence is reduced to Vesta Snow, who appears unworthy of credit, and Mary E. Pleasant, of whom more hereafter.

But why are not her relatives called, to whom she says she disclosed the fact of her marriage to the plaintiff; and particularly her uncle, to whom she says she made the disclosure while she was at the Grand, and to whom she says she showed the declaration of Martha Wilson's soon after she left there? What more probable than, if she could get the testimony of persons like these to verify her claim and corroborate her statements, she would not be leaning on such broken reeds as Snow and Pleasant?

Counsel for the defendant, when pressed on this point during the argument, replied that it was not competent for the defendant to prove her own declarations in support of the writing or the marriage; but if the plaintiff wanted to contradict her in this respect he could have called those persons for that purpose.

But it was time enough to discuss the question of competency when the objection was made by the plaintiff. If the defendant really believed that she could prove these acts and declarations of hers by these relatives she would have called them, of course. It may be admitted that the competency of the proof was in part open to argument; but

that would not have prevented her from offering it at least, especially as she did introduce testimony of the same kind.

If the declarations as to the marriage or the existence of the declaration were made during her residence at the Grand, they were, in my judgment, admissible as a part of the *res gestæ*: 1 Whart. Ev., secs. 258, 259; 2 Greenl. Ev., sec. 462; 1 Bishop on Mar. and Div., secs. 438, 540; but certainly it was competent to call her uncle to prove that he had seen the declaration of marriage and "Dear Wife" letters at Martha Wilson's house just after the defendant left the Grand.

These relatives are admitted on all hands to be respectable people, and it is a very suspicious circumstance that not one of them—not even the brother—is called or appears to support the defendant in any way. Her omission to call them to corroborate her statements is an admission that they would not do so because they could not.

It is true that the plaintiff might have called them in rebuttal to contradict the defendant; but as she in effect admitted, by not calling them, that they would not corroborate her, that was sufficient for his purpose, and he might well refrain from needlessly bringing them into painful prominence in this unpleasant and unsavory affair.

Mary E. Pleasant, better known as Mammie Pleasant, is a conspicuous and important figure in this affair, without whom it would probably never have been brought before the public.

She appears to be a shrewd old negress of considerable means, who has lived in San Francisco many years, and is engaged in furnishing and fitting up houses and rooms, and caring for women and girls who need a mammie or a manager, as the case may be.

The defendant states that she became acquainted with this witness early in 1881, and soon after told her of her marriage and showed her the documents; that from the time she had the trouble with the plaintiff she put herself under her direction and control, and by her advice suppressed all allusion to herself as the wife of the plaintiff in the letters she wrote him after she had been ordered from the hotel;

1885.]

Opinion of the Court—Deady, J.

and as an excuse for this extraordinary abnegation of herself and affairs in favor of this old woman, she swears:

“Mammie Pleasant was old and had the experience, and she had the experience of lots of *girls and women*—had the experience of the world; and being a servant, and being a wife, and being the head of families, I took her advice and wrote just about what she would dictate. . . . I was much of a baby.”

Mammie Pleasant has taken charge of this case from the beginning, and, to use her own phrase, is making the defendant's “fight,” whom she supports, and to whom she was forced to admit, after much evasion, she has advanced more than five thousand dollars, and how much more she would not tell. In my judgment, this case, and the forgeries and perjuries committed in its support, have their origin largely in the brain of this scheming, trafficking, crafty old woman.

She states that as early as 1881 the defendant wanted her to furnish her house at a cost of five thousand or six thousand dollars on the strength of her relations with the plaintiff. But it seems that Mammie was not certain that the plaintiff could be held liable for the expense, and so she called on her counsel, Mr. Tyler, and stated the case to him, without, as she is careful to say, mentioning any names; but said that the man owned two hotels and was living in one of them, and the woman in the other, which, under the circumstances, is equivalent to saying, “the party of the other part” is William Sharon. After due deliberation Mr. Tyler gave her a written opinion, which, she says, cannot now be found, to the effect that such a contract as she mentioned and he suggested, was a lawful marriage under the code, and the supposed man who owned two hotels (the Palace and the Grand) would be legally liable for the expense of furnishing his “code” or “contract” wife with a suitable residence, although he was then maintaining her at a cost of five hundred dollars a month at the Grand.

Mr. Tyler admits that in the fall of 1881 or the spring of 1882 he was consulted by the witness, as she states, and that he gave her a written opinion to the effect that the man

Opinion of the Court—Deady, J.

[December,]

would be liable; but I am quite certain that if the real date of this conversation is ever satisfactorily ascertained it will be seen that it took place in 1883.

But however this may be, defendant and the witness being thus instructed or informed as to what constituted a valid contract or declaration of marriage under the code, in due time and by means best known to themselves, produced this document, which as a legal composition is worthy of its origin, and which, in the language of the senior counsel for the defendant, is beneath the learning and skill of a "jack-legged lawyer."

On the other hand, a number of apparently respectable witnesses testify to declarations and conversations of the defendant during her residence at the Grand and afterward, that are utterly irreconcilable with the idea that when they were made she had any idea she was the wife of the plaintiff.

Mrs. Mary H. Brackett, the mother of Nellie, says the defendant lodged at her house from early in August to late in November of 1882, and that shortly before she left she told her that she had been engaged to the plaintiff, but it was broken off. Her brother, she said, was opposed to the match, because Sharon's "pedigree was inferior to hers." She also said he was a shriveled up old man anyhow, whom no one would marry but for his money.

Mrs. Sarah Millett, formerly Sarah Orr, was for a long time seamstress at the Grand. Her room was near the defendant's, and they appear to have been quite intimate. She swears that while the defendant was living at the hotel she told her the plaintiff was her beau, and that just before he left for Washington, in January, 1881, he wanted her to go with him and be married privately, which she declined to do, and was since sorry for it; and this she said many times, including the last night when she was in the hotel, when the witness was lying on the bed with her. In the spring of 1882 this witness called to see the defendant on Ellis street, when the latter begged her to bring herself and Sharon together again, promising, if he married her, to give the witness a house and lot.

1885.]

Opinion of the Court—Deady, J.

Mrs. Sarah Morgan heard the defendant say at Mrs. Hardenberg's lunch table at Oakland, in August, 1881, that her engagement with Sharon was broken off, and that she was going East. and maybe to Europe; and that in 1880, and after August 25th, she told the witness that she was "engaged to be married to Senator Sharon."

Mrs. Hariet Kenyon was with the defendant as maid, except for one week, from September 11th, to the latter part of November, 1881. The facts stated in her testimony are altogether incompatible with the idea that the defendant was, or even wanted to be, the plaintiff's wife, but rather that the old love for the lawyer was on again, whom she visited slyly, and dined with at the Verein club, and came home speaking of as, "—, sweetie, how I love you."

Mrs. Nellie Bacon knew the defendant slightly when she first lived at the Baldwin. In the fall of 1880 she went to the Grand to board, where she remained until April, 1881. She says that during this time she saw the defendant daily, and she said the plaintiff was paying her attention, and might propose to her; that a proposal from him involved "many delightful things, and one not so delightful—his advanced age;" but that she preferred the lawyer to any of her lovers. In January, 1881, when the plaintiff went to Washington, the witness, at the request of the defendant, draughted a letter for her to plaintiff, designed to make him propose or compromise himself, which she copied and sent to him; but soon after the plaintiff returned from Washington she said she had trouble with him, and was afraid he would never marry her.

It is true that defendant denies all these statements, and speaks contemptuously of the people who make them as persons beneath her notice. But they appear to have been her associates, even in her better days, and there is not a circumstance in the case that makes against the integrity and character of either of them. Besides, it won't do to sneer at these people while she consorts with Vesta Snow and Mammie Pleasant. Add to this, her credit is so badly damaged that her unsupported statement is not sufficient to overcome, or even seriously impair, the effect of positive

Opinion of the Court—Deady, J.

[December,

testimony from unimpeached, and, so far as appears, unimpeachable witnesses.

And lastly, let us consider how the existence of these documents and the claim of the defendant that she is the wife of the plaintiff since August 25, 1880, comport or correspond with the situation of the parties at the time, and their daily walk and conversation since.

In August, 1880, the plaintiff was in the decline of life, in the possession of a very large fortune, with a family of grown-up children, to whom he was much attached. As was said in *Holmes v. Holmes*, 1 Sawy. 119, in speaking of a person somewhat similarly situated: "With him the primary object of marriage—the procreation of children—had been long accomplished, and the secondary one—the avoiding of fornication—does not appear to have much concerned him."

The defendant was a mature young woman of rather prepossessing appearance and tolerable attainments, with some years' experience in hotel life and stock speculations. During the past eight or ten years she had lived in comparative luxury and ease on money derived from her family.

But early in 1880 she found herself without means and the losing party in a protracted game of hearts, for which she sought, but without effect—

"To give repentance to her lover
And wring his bosom"—

by attempting to commit suicide in his presence.

In this desperate condition she met the plaintiff, an unmarried man with the reputation of a Giovanni, and, without any formal introduction, accepted an invitation to his private office to "talk stocks," which soon ended, as she must have expected, if not desired, in talking about herself.

If this interview had ever taken place, as the defendant relates it, it was much more likely, under the circumstances, to have ended in an arrangement by which the plaintiff would pay her five hundred dollars a month to be his convenient friend, than that he should then and there make her his wife, and admit her to an unqualified marital right and interest in his immense fortune.

1885.]

Opinion of the Court—Deady, J.

Taking the defendant's account of the transaction, the pages of fiction furnish no parallel to the singular and unnatural conduct of these parties. There was no preliminary courtship, but barely an acquaintance between them. They came together fortuitously in the stock operations of California street, and their personal intercourse began with a proposition from the one that the other should be his mistress, which she declined, apparently, without being offended, when he, unable to control his sudden passion, offered her marriage, which she readily accepted. After a few words of parley as to the *modus operandi*, she agreed to a secret marriage, to be evidenced by a writing under the code, executed by the parties, but unattested by witnesses. Thereupon the defendant, at the suggestion and dictation of the plaintiff, wrote, at one sitting—*currente calamo*—this unique declaration, without altering or correcting a word or phrase therein, to which the latter then signed his name, adding, I suppose, by way of emphasis, the words, "Nevada, Aug. 25, 1880."

And then without more ado, without even a parting kiss or fond embrace, they went their several ways, as if nothing more had happened than a deal in Belcher—not knowing, and apparently not caring, whether they should ever meet again. This ardent lover, whose fervent affection led him to back the offer of his plethoric purse with his widowed hand, turned his back on the lovely and consenting Althea to give his heart and soul to the study and control of Nevada mines and politics, while she, in the pathetic language of counsel, remained "an ungathered rose."

They separated without any arrangement for the future, and no communication passed between them for weeks thereafter; and none appears to have taken place until about the date of the letter to her at the Baldwin, which reads more like a solicitation for an assignation than a communication from a husband to a wife.

During this time the Galindo hotel burned down, and she was compelled to seek new lodgings, and went back to the Baldwin.

She admits that she never informed her alleged husband

Opinion of the Court—Deady, J.

[December,

of the occurrence or her whereabouts, and when asked to explain this singular conduct, she could do no better than give this frivolous and flippant answer, which carries its refutation on its face:

“I knew when he came down (from Nevada), if he wanted to see me, he could find me. I don't think it necessary for wives to run after their husband. I didn't take the trouble to notify him where I had gone to. I thought if he cared so much for me as he pretended to, he would find me. I am not in the habit of running after people.”

The defendant's idea of what a wife would or should do, under such circumstances, is evidently not founded on experience, and judging from her conduct and the explanation of the same, it is evident that she has yet to feel the tender solicitude that a true woman has for one to whom she has given her heart and hand in holy wedlock.

And now, could anything be more unnatural and improbable than this? There is no escape from the conclusion—the conduct of the parties was contrary to human nature and common experience, and makes the story of the marriage utterly incredible, even if it was not contradicted by the oath of the plaintiff.

But the conduct of the parties, after they found one another, also contradicts and is altogether irreconcilable with her claim of marriage, and stamps with the mark of falsehood and forgery the declaration and letters relied on to support it.

It is apparent that the defendant went to the Grand to live in pursuance of some arrangement with the plaintiff, soon after the letter to her of September 25, 1880. This is plainly indicated by the contents of the letter to her from Virginia, inclosing the one to Thorn, and of that also. But during her fifteen months' residence there, the parties, so far as appears, never addressed or spoke of one another, in public or private, orally or in writing, as husband and wife, or said anything that implied such relation. Nor does it appear that any such claim was ever made or admitted by either of them under any circumstances.

The intercourse between the parties, so far as is known

1885.]

Opinion of the Court—Dady, J.

or may be inferred from the evidence, was of a familiar and somewhat commonplace character, but utterly wanting in the tender consideration and respect usual and proper between husband and wife in their station of life.

The character of his letters to her has already been commented on. They are very brief, and either relate to the payment of her allowance or contain an invitation to dinner, which plainly implies that she was not in the habit of sitting at his table or expected there, unless specially invited. They are utterly void of affection, and altogether lacking in mention or even allusion to the numberless and nameless little incidents and affairs peculiar to every married couple, and which, taken together, constitute the charm as well as the staple of married life. And although Christmas and New Year passed and a birthday came to her while there, it does not appear that she ever received a present, greeting, or other token of affection from the plaintiff.

But there are convincing proofs in the conduct of the parties other than these general and negative ones, against this claim of marriage.

Take the circumstance of concealing herself in the plaintiff's rooms and watching him and another undress and go to bed together, and the indifferent and indecent levity with which she carried the story to the seamstress. Waiving the moral insensibility which such conduct implies, it is inconceivable that a wife could witness such a scene without some manifestation of anguish, if not anger; and what is worse, that she could regard it as a good joke, and gleefully relate it as such to others.

Speaking of the affair, she says, "I laughed at it, and told it to a good many people. It was a very amusing affair to me."

Afterwards, when she came to sign her deposition, and had had time to reflect, and perhaps receive a suggestion, she seems to have realized the damaging nature of her admission, and said that, although she laughed at the affair, she was "angry," too.

But whether she was "amused" or "angry," or whether she laughed simply or with a laughter akin to tears, she did not act like a wife.

Towards the close of the year 1881 the plaintiff had evidently gotten tired of the defendant, or distrusted her, and probably both. Moved by these considerations he had a settlement with her, in which he gave her seven thousand five hundred dollars, as already stated, for which she gave him a receipt in full of all demands; soon after which he had her summarily, and against her abject petition and remonstrance, expelled from the hotel.

Now, if the plaintiff was married to this woman, and knew she had the written evidence in her possession of that fact, it is not reasonable or probable that he would have gone to such extremity with her. And although it may be claimed that he acted on the supposition that she had lost the declaration, and she swears she told him so, for the purpose of preventing him from getting it away from her, he must have known that if she had letters of his addressed to her, as "Dear Wife," they were as good weapons in her hands as the declaration itself.

However, it is sufficient to say that his conduct on this occasion was anything but that of a husband. In fact, he never, so far as appears, treated her otherwise than as a plaything or fancy for which he was paying as he went, and expected to as long as it suited him.

But the conduct of the defendant on this occasion is enough, in my judgment, to settle this question against her, even if the plaintiff was silent on the subject.

When she was ordered to leave the hotel she wrote the plaintiff three letters in quick succession, beseeching him by every consideration that occurred to her, to allow her to remain on the old footing under his roof. If at the time she believed herself to be his wife, it is impossible that she should have written these abject appeals to the plaintiff, every word and syllable of which read like the wail of a poor discarded friend or mistress, and not the confident and certain reply of an outraged wife, conscious of her rights and her power to assert them.

It is not necessary, and space will not permit, to call attention to these letters in detail. They are cotemporaneous conduct of the defendant, at the most important crisis in

1885.]

Opinion of the Court—Deady, J.

her relations with the plaintiff, and their purport cannot be misunderstood. The mere perusal of them is enough to convince any one that they were not written by a wife to her husband. These honored terms do not even appear in them. In her direst distress she dare not address him as husband, or call herself his wife. The highest ground on which she bases her appeal for mercy is "friendship,"—an indefinite term, which might well be used to characterize the relation between any unmarried man and woman.

She asks the question, would you "stoop to injure a *girl*, and one whom you have pretended to love?" And again, she says: "Don't do things now that will make *talk*." What "talk" is she afraid of, but "talk" about their doubtful or illicit relations? Further on she urges her claim in language that cannot be misunderstood for that of a wife: "Mr. Sharon, you have been kind to me. I have said I hoped my God would forsake me when I ceased to show my gratitude." "I had hoped to always have your friendship and good will throughout life, and always have your good advice to guide me." "I valued your friendship more than all the world. Have I not given up everything and everybody for it?" "I have always been kind to you, and tried to do whatever I could to please you, and I hope at least, in your unjust anger, you will let us *apparently part friends*, and don't do or say anything that could create or make any *gossip*."

"Gossip" about what? That the defendant was the plaintiff's wife, and they had been secretly married. Was that what she was afraid of? No, not at all; but rather that she was his leman and had misbehaved herself, and been discharged.

The plaintiff took no notice of her wail, and she was compelled to go. But she was not without hope that they might be friends again, and in the summer of 1882 she appears to have been in the habit of calling on him at the Palace, but her calls were never returned. And in August of that year she wrote the plaintiff the remarkable letter, known as the "us girls," or "egg and champagne" letter.

It is given above in full, and speaks for itself. How any

one can have the hardihood to claim that it was written by a wife—and a deeply injured one—to a cruel and unfaithful husband, is more than I can understand.

It is apparently the work of an artful woman who is anxious to get her net over the head of a wayward old millionaire again, and recall him to her side once more—not so much for love, as moonlight drives, visits to the springs, lovely days in the country, egg in champagne, and the like. And distrusting the power of her own familiar charms and honeyed phrases, she adroitly contrives to put young “Nell” in the foreground, as a fresh lure to the wary old bird.

Some time after this the defendant took Nellie Brackett with her to the Palace, and the plaintiff had them both put out of the hotel; whereupon the letter signed Miss Brackett, and known as the “Old Sharon” letter, was written and sent to the plaintiff. The defendant says the letter was written by Nellie Brackett, but that she knew of it and approved of it, but I think there is no doubt but that she dictated it or wrote it herself and had Nelly copy it. But that is not very material to my present purpose. Certainly the writer of this letter never dreamed that the defendant was the wife of the man she was berating, and if Nellie wrote it, it is another cogent circumstance to show that she did not know of the alleged marriage, or the existence of the disputed documents, and that the defendant’s statement that she had before then told her of the one and showed her the other is untrue; and to this effect is Nellie Brackett’s testimony. But if it was written or dictated by the defendant, it is only another link in the long chain of independent and indisputable circumstances contradictory of the defendant’s claim and testimony.

The writer speaks of the defendant as “a motherless, fatherless girl, * * * alone in the world,” and leaves no room for even an implication that she ever thought of her as the wife of any one. The style and matter indicates that the defendant can be fierce and abusive as well as wheedling and fond; but she had no thought then that the person she addressed as “you horrible, horrible man,” was her own dear husband.

1885.]

Opinion of the Court—Deady, J.

The character and contents of these five letters of the defendant are too damaging to her claim to be passed over in silence. They could not be directly denied, but a weak attempt has been made to palliate them.

The defendant first took refuge in the secrecy clause of the declaration, which bound her not to make its contents "public" for two years, although it is probable that the last two of these letters were written after that period had expired. She said she was advised that if she did not keep that promise the marriage would become void or the plaintiff would make her trouble, and therefore she did not feel at liberty to address him, even privately, as his wife or her husband—even when he was driving her from his presence and protection. It is not likely that any lawyer ever gave her any such absurd advice, and as she has failed to call the adviser to corroborate her statement, that story may be dismissed.

However, on being confronted with some imaginary conversations she says she had with the plaintiff during this period, in which she told him to his teeth that she was his wife and meant to have her rights as such, she fell back on her good genius Mammie Pleasant. She says she wrote the letters and wanted to do so as the plaintiff's wife, but this wise old manager would not let her write a word to the plaintiff indicating that she was his wife, for fear it would "rile" him, and make trouble.

This is a very flimsy story and altogether unworthy of credit. To one who has seen and heard the defendant in court and has read the report of her examination before the examiner, the idea that old Mammie Pleasant or any one else could control her tongue or pen in her intercourse with the plaintiff is simply ridiculous.

Neither is it reasonable that she or any one else would regard it as a violation of the secrecy clause in the declaration for her to address the plaintiff in private as his wife, and to insist on being treated accordingly. She did, according to her own statement, tell a number of persons before this of the marriage, and she says she did not think that was making it "public." Then how could she imagine she

was not at liberty to speak of the matter in private to "the party of the other part?"

But the inconsistency of her conduct, compared with her claim, does not stop here. For more than a year after the expiration of the secrecy clause, she made no sign or pretense of being the plaintiff's wife. During this time the plaintiff paid her no attention, but treated her as a person he was well rid of. Her financial resources were daily diminishing as she neared the end of the provision made for her by the plaintiff in the fall of 1881. There was no longer any reason why she should not openly address the plaintiff as his wife and demand recognition and support from him accordingly. Not only this, but she had every reason now to exhibit her documents to her brother and other relatives, and at least claim their countenance and advice.

But, instead of this, she gave herself and her cause into the keeping of an old woman who appears to be no better than a go-between, and one William Neilson, of whom the counsel for the plaintiff said, on the argument, without objection or reply from any one, as a reason for not having taken his testimony, "It was not thought worth while to tarnish the record with any statement he might make."

And through such agencies and advice, as Pleasant's and Neilson, she, finally, on September 8, 1883, without a note of warning to or demand on her alleged husband, precipitated her case on the public in a melodramatic and round-about way, by having the plaintiff arrested for adultery, on the assumption that he was her husband, and soon after publishing the declaration and what purported to be a "Dear Wife" letter.

But the original of this letter has never been produced, and the defendant on her examination admitted that she never had one like it. Nellie Brackett swears that it was addressed "My Dear —," and that the defendant afterwards spoiled it in trying to substitute the word "Wife" for the dash. Her testimony on this point is substantially as follows:

"After Mr. Sharon's arrest, Neilson said he would pub-

1885.]

Opinion of the Court—Deady, J.

lish the letter addressed 'My Dear ——' as 'My Dear Wife.' Miss Hill said she did not like that, because she had no such letter. Neilson said that he would see that she had a 'Wife' letter out of that one that had a dash on it. After four or five weeks, he not attending to it, she tried to fix that letter herself and spoiled it." Her testimony is strongly corroborated by that of the defendant, and squares with the admitted facts and probabilities of the case.

But the effect of this circumstance does not stop here. The transaction furnishes another convincing argument against the existence of the "Dear Wife" letters, as late as September, 1883. For if the defendant had had the "Dear Wife" letters when Neilson published the admitted spurious one, she would certainly have furnished him one of them for publication.

Neilson's relations with the defendant at that time, and his position in the affair, are not doubtful. He was her agent and adviser, and knew as well as she did that she then had no "Dear Wife" letters. This will appear from the agreement between her and her counsel for the division of the prospective fruits of this predatory litigation.

On October 24, 1883, Mr. Tyler made a written agreement with the defendant, she signing it as "S. A. Hill," for the prosecution of a suit against the plaintiff for the vindication of her good name and a division of the common property, which they subsequently alleged to be of the value of ten million dollars, for one half of what he might recover. The agreement contains a clause to the effect that Mr. Tyler will not settle with Sharon without the consent of the defendant "and her agent, William Neilson"—who doubtless was an agent with an interest, and well advised in the premises.

The only inference to be drawn from these facts is that on September 8, 1883, and until some time afterward, the "Dear Wife" letters were not in existence. The tracing and alteration had not then been done. The conspiracy had not progressed so far. No credible witness swears to having seen them earlier than September 26. And if any one had, in the light of these facts, it would be considered a mistake.

R. P. Clement says he saw them between September 26 and October 10. C. D. Cushman says on October 20; Samuel Soule says on November 23; and W. B. Tyler says in October. Vesta Snow and Mammie Pleasant are the only persons who say they saw them earlier.

I have thus gone over the salient points in this case at some length. Much more might be said on minor points to the same effect. But this, in my judgment, is sufficient to show that, humanly speaking, it is not possible that this declaration of marriage was ever signed by the plaintiff, and that it is morally certain that both it and the "Dear Wife" letters are false; that they were practically forged by the defendant by writing the declaration over a simulated signature, and by making tracings and alterations of letters from the plaintiff to herself, and substituting in the address thereof the word "Wife" for "Miss Hill" or "Allie," and omitting at the end of the one in ink the words "Yours Truly;" and that the claim of the defendant to be the wife of the plaintiff is wholly false, and has been put forth by her and her co-conspirators for no other purpose than to despoil the plaintiff of his property.

In this undertaking, doubtless, the proverbial sympathy of the multitude for an attractive young woman engaged in an affair of this kind with an immoral old millionaire was largely relied on to make the conspiracy successful. But in a court of justice such considerations have no place. Here, at least, the conduct of the parties must be measured and characterized by the evidence, and have effect according to the law in such cases provided.

A woman who voluntarily submits to live with a millionaire for hire, ought not, after she finds herself supplanted or discharged, to be allowed to punish her paramour for the immorality of which she was a part, and may be the cause, by compelling him to recognize her as his wife and endow her of his fortune.

If society thinks it expedient to punish men and women for the sin of fornication, let it do so directly. But until so authorized, the courts have no right to assume such function, and, least of all, by aiding one of the parties to an

1885.]

Opinion of Sawyer, C. J., concurring.

irregular sexual intercourse to despoil the other, on the improbable pretense that the same was matrimonial and not meretricious.

The question of whether there was a marriage between these parties, assuming the defendant's statement to be true, does not directly arise in this case. This suit is brought to annul the written evidence of the alleged marriage, on the ground of its falsity, and to enjoin the defendant from setting it up or using it to the prejudice or injury of the plaintiff.

But in determining this question, the conduct of the parties during the time it was claimed they were living under this instrument as man and wife, has necessarily been examined, and found not to support such claim. And so far as the element of consent in this alleged marriage depends on this declaration, the conclusion that it is false, is equivalent to a determination that there was no marriage between the parties, and that their intercourse was meretricious.

But I cannot refrain from saying, in conclusion, that a community which allows the origin and integrity of the family—the corner-stone of society—to rest on no surer or better foundation than a union of the sexes, evidenced only by a secret writing, and unaccompanied by any public recognition of each other as husband and wife or the assumption of marital rights, duties and obligations except furtive intercourse, more befitting a brothel than otherwise, ought to remove the Cross from its banner and symbols and replace it with the Crescent.

The plaintiff is entitled to the relief prayed for, and it is so ordered.

SAWYER, Circuit Judge, concurring. The following statement of the proceedings in this case will present the points of law decided:

The bill was filed October 3, 1883, the object being to cancel, as a forgery and a fraud, an alleged written declaration of marriage, a copy of which is set out in the bill. A subpoena was thereupon issued, and on October 3, 1883, duly served on the respondent, who entered an appearance on the next rule day, November 3, 1883.

Opinion of Sawyer, C. J., concurring.

[December,

On November 1, 1883, nearly a month after the filing of the bill, and service of subpoena in the case, the respondent by the name of Sarah Althea Sharon, filed a complaint against William Sharon, complainant herein, in the superior court of the city and county of San Francisco, wherein she alleged, that on August 25, 1880, she and said Sharon, by mutual agreement, became husband and wife, and commenced cohabiting together as such; that, "inasmuch as said marriage had not been solemnized in the mode provided by section 70 of the civil code of California, the plaintiff and defendant, jointly, made a declaration of marriage in writing, signed by each of them, substantially in form required by section 75 of the civil code of California, and until the month of November, 1881, the plaintiff and defendant lived and cohabited together in said city and county as husband and wife;" that on or about November 5, 1881, defendant demanded of the plaintiff in said suit, a surrender of said declaration of marriage, and threatened violence if she refused to comply with his demand; "refused to recognize his said marriage with plaintiff, and drove plaintiff from him, and refused to live or cohabit with her for more than a year, thereby willfully deserting her." In addition to desertion, she alleged numerous acts of adultery with other women, as further grounds for a divorce. She then prays "that her marriage with said defendant may be declared legal and valid;" "that she may be divorced from said defendant," and for a division of the common property, alleged to be of more than ten millions of dollars in value.

On November 10, 1883, defendant, William Sharon, filed his answer to said complaint in the superior court, denying all the allegations relating to the marriage, and averring, that said alleged declaration of marriage in writing is a forgery, and fraud. On November 22, 1883, defendant, Sharon, removed the case to this court, on the ground that he was a citizen of the state of Nevada, and plaintiff a citizen of California; and the transcript of the record was filed in this court two days thereafter, on November 24, 1883. On December 3, 1883, the plaintiff in said suit gave notice

1885.]

Opinion of Sawyer, C. J., concurring.

of a motion, based on the record in the case, to remand the same to the state court, on the ground "that the said circuit court has no jurisdiction in the suit, neither of the subject-matter thereof, nor of the parties." Without bringing this motion to a hearing, on December 31, 1883, on application of plaintiff's attorneys therein, and on stipulation of counsel, as follows: "It is hereby stipulated by and between the respective parties, that the above entitled suit be remanded to the superior court of San Francisco, state of California, whence it came," it was "ordered that the above entitled cause be, and the same hereby is, remanded to the superior court of the city and county of San Francisco."

After the case had been thus remanded to the superior court, on January 3, 1884, a stipulation in the following language, signed by the attorneys of the respective parties, was filed in said superior court: "It is hereby stipulated and agreed by and between the respective parties to this suit, that the above entitled cause may be assigned to department two of said court, and tried by Hon. J. F. Sullivan, without a jury."

In the meantime, on the rule day next succeeding her appearance in this court—December 3, 1883—respondent, Sarah Althea Hill, filed a demurrer to the bill in this suit, which was argued and submitted on January 21, 1884, and after due consideration overruled March 3, 1884, in an opinion reported in 10 Sawy. 48.

On April 24, 1884, after two extensions by the court of time to plead, a plea in *abatement* was filed by respondent, alleging: 1. Another suit pending in the superior court for the same cause—said suit of *Sharon v. Sharon*. 2. That complainant, Sharon, was, at the commencement of the suit, and still continued to be, a citizen of California, and not of Nevada, as alleged by him. A replication to this plea was filed May 5, 1884. The case then, in pursuance of the practice of the court, went regularly upon the calendar of the July term, 1884, for trial of the issue on the plea in abatement, and on the regular call of the calendar, in pursuance of the rules and practice of this court, on July 14, the first

Opinion of Sawyer, C. J., concurring.

[December,

day of the term, it was set down for hearing for September 2, 1884. On September 2, upon being regularly called in its order, the hearing was continued to October 15, 1884. On October 15, the case, upon being regularly reached and called in its order, was submitted for decision by the counsel for complainant, in pursuance of rule 44 of this court, no counsel appearing for respondent. The case was submitted on the pleadings, without evidence, none having been taken—more than five months having elapsed since the case was at issue on the plea, and the time for taking testimony having long before expired, no extension of time for taking testimony having been granted, or applied for, by either party. On October 16, 1884, the plea was found false and overruled on that ground, there being no evidence to support it. (See opinion of the court, reported in 10 Sawy. 394).

Leave to answer *to the merits* within thirty days having been given, and the time having been from time to time extended, an answer was finally filed on December 30, 1884, in which the allegations of the bill, including the allegation of the citizenship of complainant, were denied—an attempt being thereby made, without leave of the court first obtained, to again raise, in the general answer, the issue of citizenship before determined and adjudged on the plea in abatement.

No application had been made, or leave granted for a rehearing on the plea in abatement, or to reopen that issue, already passed into judgment, and the interlocutory decree adjudging the plea false, and overruling it, was still in full force. A replication to the general answer having been filed, and the case put at issue January 2, 1885, the parties, shortly thereafter, proceeded to take testimony. During the time these proceedings were going on, the trial of the said divorce suit of *Sharon v. Sharon* was commenced in the said superior court on March 10, 1884, and continued from time to time until September 17, 1884, when it was finally submitted to the court for decision.

On February 18, 1885, the court filed its findings of fact, and conclusions of law, and ordered a decree in favor of complainant, granting a divorce, which decree was entered

1885.]

Opinion of Sawyer, C. J., concurring.

upon the findings on February 19, 1885. In the decree, after reciting that it is "found that plaintiff and defendant intermarried in August, 1880, and that the defendant deserted the plaintiff in December, 1881," it is ordered, adjudged, and decreed, that the plaintiff and defendant are husband and wife, and that the marriage now existing between the plaintiff and Sarah Althea Sharon be, and the same is, hereby dissolved, and that said parties are, and each of them is, freed from the obligations thereof."

The second finding of the court in said case is as follows: "That on the 25th day of August, A.D. 1880, the plaintiff and defendant each signed a certain declaration of marriage, in the words and figures following, to wit:'

(Here is set out the contract in the same language and form as set out in the bill in this suit, and in the opinion of my associate, and, also, as it appears in 10 Sawy. 48).

"Which was the only written declaration, contract, or agreement of marriage ever entered into between said parties, and, at the time of signing said declaration, plaintiff and defendant mutually agreed to take each other as, and henceforth to be to each other, husband and wife."

The third, fourth, eighth, and ninth findings are as follows:

"3. That afterwards, and about the——day of September, 1880, the plaintiff and defendant commenced living and cohabiting together in the way usual with married people, although their cohabitation was kept secret, and so continued for the space of more than one year, and down to the twenty-fifth day of November, 1881, and during all of said time plaintiff and defendant mutually assumed towards each other marital rights, duties, and obligations."

"4. That during the time plaintiff and defendant so lived together, defendant visited her relations with her, escorted her to places of amusement, and introduced her to respectable families and to members of his own family, and wrote to her several letters, while absent from her, in which he addressed her as 'My Dear Wife.'"

Opinion of Sawyer, C. J., concurring.

[December,

"8. That it is not true, as stated in the answer of defendant, that plaintiff has either falsely or fraudulently assumed the name of Sarah Althea Sharon; but, on the contrary, that it is her real name; nor is it true that she, or any one, forged the document mentioned in the complaint and heretofore set forth; on the contrary, the said document is genuine, and was signed by the plaintiff and defendant at the time it purports to have been signed."

"9. That defendant never introduced plaintiff as his wife, nor spoke of her as such in the presence of other persons. That plaintiff never introduced defendant as her husband, nor spoke to nor of him to other persons in his presence as her husband. That the parties were never reputed among their mutual friends to be husband and wife, nor was there at any time any mutual open recognition of such relationship by the parties, nor any public assumption by the parties of the relation of husband and wife."

On February 26, 1885, the defendant, Sharon, took and perfected an appeal from said judgment of the superior court to the supreme court of the state, and gave a bond of such character as, under the statute, to operate as a *supersedeas*, and a stay of all proceedings pending the appeal, and the case now stands pending on appeal, and undetermined, in the supreme court of the state.

After the rendering of the said judgment in the state court in said case of *Sharon v. Sharon*, the respondent presented to this court a certified copy of the pleadings, findings, and judgment (or decree) therein, and asked leave to file a supplemental answer in this case, setting up such record as *res adjudicata*, and praying a stay of proceedings in this case "until the judgment in said case of *Sarah Althea Sharon v. William Sharon shall become final*," thus recognizing the fact that said judgment had not yet "*become final*."

The complainant, in response, presented a copy of the record, showing that a suspensive appeal had been taken, and was then pending. On March 4, 1885, leave was given to file the supplemental answer, and it was filed, but the court reserved the determination of the effect of the proceed-

1885.]

Opinion of Sawyer, C. J., concurring.

ings set up in the supplemental answer until the final hearing of the case, and denied the motion to stay proceedings until the judgment shall "become final" in the state court.

It also appeared, upon the final hearing, that defendant Sharon moved for a new trial in said case of *Sharon v. Sharon* in the superior court, and that said motion for new trial is still pending and undetermined in said court.

On March 9, 1885, in resisting an application on the part of complainant to compel the respondent in this case to produce certain papers before the examiner to be used in evidence, the respondent urged that the bill did not allege the citizenship of the parties in such form as, upon its face, shows jurisdiction in this court over the case, and for that reason the court had no authority to make the order.

This objection, after argument and full consideration, was overruled, and the bill, on that point, sustained in an opinion reported in 10 Sawy., 635.

In resisting a further order to show cause why certain papers should not be produced before the examiner for purposes of evidence in the case, on April 20, 1885, the respondent filed several affidavits, tending to show, that the complainant, Sharon, was not, at the commencement of the suit, or at any time afterward, a citizen of Nevada; but was during all the time a citizen of California, and, therefore, that the court had no jurisdiction over the case, and, consequently, no jurisdiction to make the order sought. The court, in a decision reported in 10 Sawy., 666, rejected the affidavits, on the grounds, that the question of citizenship had been, conclusively, and, finally, determined *for this case* on the plea in abatement, the decision and interlocutory decree adjudging the plea false being still in full force; and that there was no longer an open issue in the case on the question of citizenship. Also, on the ground that the issue, if open for trial, would not be determined upon *ex parte* affidavits, but, only, as one of the issues in the case.

Notwithstanding these rulings, the respondent put in testimony before the examiner, under and subject to the objection of the complainant, that it is immaterial and irrelevant to any open issue in the case, and, at the hearing, insisted

Opinion of Sawyer, C. J., concurring.

[December,

that the issue was still open, and that the testimony should be considered, and the issue again decided on the evidence as *then presented*. Respondent's counsel, also, insisted upon again arguing the question made, and decided, on the demurrer, that the bill does not state a case for equitable cognizance.

The court, being fully satisfied with its former decisions on these points, overruled the application of respondent's counsel, and declined to hear further argument upon them.

Upon the foregoing state of facts the points of law to be considered arise. It is first insisted, that the complainant is estopped from litigating the validity of the alleged marriage contract, in this case in this court, by the stipulation mentioned, in pursuance of which another case—the said case of *Sharon v. Sharon*—was remanded to the state court. It is claimed that by that stipulation all the matters in controversy between these parties was agreed to be litigated in the state court, alone. But nothing of the kind appears, expressly, or, inferentially, in the stipulation. It makes no reference to this case at all. That case was commenced in the state court, and removed to this court by the defendant therein under the act of congress of 1875, on the supposition that he had a right to try it in the courts of the United States. The plaintiff in the case denied that right on the face of the record, on the grounds that the subject matter—it being a suit for divorce—was not within the jurisdiction of this court in any event, and, that, it did not appear to be a case for jurisdiction on the ground of citizenship, even if this court could take jurisdiction, in any case, of a suit for divorce. On these grounds complainant moved to remand the case, as having been improperly removed, and in view of the decision of the supreme court in *Barber v. Barber*, 21 How. 584, the respective counsel may have supposed, that there was some ground to believe, that the motion might be sustained on the ground of want of jurisdiction over a suit for divorce, had it been prosecuted to a decision. However this may have been, the respondent's counsel, either having doubts upon this jurisdictional point, or for some other reason satisfactory to themselves, concluded not to require

1885.]

Opinion of Sawyer, C. J., concurring.

the motion to be pushed to a decision, and to permit the motion to be granted. Thereupon they consented, in writing, that the case should be remanded to the court whence it came.

This was simply a substitute for the hearing of the motion, and a decision upon it, which, if sustained, would still compel them to go back. They, simply, submitted to the motion, and the only effect, was, to return the case to the state court, and place it *in statu quo*. The stipulation had no reference to any other case than that in which it was made, and no other purpose than to return it to the court in which it had been originally brought.

It related to that case, and that case alone. It was not intended to affect, and did not, in any way, affect this case, which goes upon an entirely different theory, and seeks different relief.

The fact that there may be some questions common to both, cannot enlarge the effect of the stipulation in question.

It is also claimed that complainant is estopped from litigating this case in this court by the stipulation of his attorneys, filed in the divorce case of *Sharon v. Sharon*, in the superior court, waiving a jury, and for the trial of the issues of that case in department two of the superior court before Hon. J. F. Sullivan, judge of that department. But this stipulation, like the other, is only a stipulation as to the course of procedure in that case, having relation to that case, and to no other. Defendant was obliged to have his case tried in some one of the twelve departments of the superior court, and he was liable to have it assigned to any one of those departments for trial. Both parties being satisfied to try it in department two, they designated that department by stipulation. This was but a substitute for the assignment of the case for trial in the usual mode. It had no other effect than to determine which one of the twelve departments to which it was liable to be assigned should try that particular case, then pending, and ready for trial in the superior court.

The effect of the judgment of the court in the case tried in department two by reason of this stipulation, as matter

Opinion of Sawyer, C. J., concurring.

[December,

of estoppel, is no greater, and no less, and in no respect other, than if the case had been regularly assigned to that department for trial by the authority of the superior court, without the stipulation, and against the protest of defendant. This stipulation, in no degree, affects the action of the court, as matter of estoppel.

Neither this stipulation, nor the stipulation to remand to the state court, taken separately—nor do they in combination—estop the complainant from proceeding in this case, nor can they in any respect affect this case.

The effect of the proceedings and judgment in the superior court is, precisely, what it would have been had that case never been removed to this court, and had it been tried in department two, or any other department to which it had been properly assigned for trial, without the consent or any action of the defendant therein. And there was no possible plausible ground deducible from the terms of the stipulations for counsel to suppose, that the stipulations affected, or that they could in any way affect, any other case, than the one in which they were made. Nor did they, in fact, so suppose, for steps were being, continuously, taken by them, and the counsel of complainant in this case, without objection, while the proceedings were going on at the same time in the case in the state court. The two cases proceeded, *pari passu*, in the two courts.

As to the point upon which we declined to hear further argument: that the bill presents no case of equitable jurisdiction, and that, upon the facts stated, this is but a suit for jactitation of marriage, it is only necessary to observe that, upon the hearing on the demurrer, in which these points were argued, Judge Sabin, of the Nevada district, and myself, gave them the fullest and most careful consideration, and, upon such consideration, we were satisfied that the case is one proper for equitable cognizance. Our views will be found expressed in *Sharon v. Hill*, 10 Sawy. 48. We are now entirely satisfied with the ruling then made, and adhere to it.

We also, at the hearing, declined to hear the evidence offered by respondent, under objection of complainant as to

1885.]

Opinion of Sawyer, C. J., concurring.

its relevancy, to show that Sharon was, at the commencement of the suit, and, subsequently thereto, a citizen of California and not a citizen of Nevada, on the issue attempted to be raised, without leave of the court, in the general answer in bar on the merits, by denying the allegation of citizenship in the bill. We declined to consider the testimony, on the ground, that, there was no open issue in the case on that point, the same issue having been made, tried, and, finally, determined, for this case, on the plea in abatement.

We, also, declined to hear further argument on the question as to whether the issue was still open for consideration, for the reason that it had been before, fully, argued in the case, and decided, and we were satisfied with the decision. (*Sharon v. Hill*, 10 Sawy. 666.)

We are still, entirely, satisfied, that the issue as to citizenship was, conclusively, determined for the case, on the plea in abatement, and was not open for further consideration on the general issue tendered in the answer in bar. Had the question not been raised and determined on a plea in abatement, it may be, that, under the act of 1875, respondent might be entitled to raise the issue in the general answer in bar, and have it determined with the other issues, at the final hearing of the case. But on that point it is unnecessary, now, to express an opinion.

Where an issue of fact has been presented and determined upon a plea in abatement, and judgment rendered thereon, until set aside, and the issue has been reopened in some regular course of procedure, such determination of the issue is as conclusive, and binding, in all subsequent stages of the case, as if tried, and found at the final hearing, and the issue closed by a final judgment thereon. Conceding that the court had authority to reopen the issue, and allow testimony to be taken, after the time allowed by the equity rules prescribed by the supreme court had expired, there was still, but one proper way to proceed, and that was, to apply for a rehearing, upon a proper showing, excusing negligence, if any there was, or to set aside the interlocutory decree upon the plea in abatement, and reopen the plea with leave to take testimony, and retry that issue. Even, then, the re-

Opinion of Sawyer, C. J., concurring.

[December,

opening of the issue, granting leave to take testimony, and a retrial of the issue, would be a matter for the exercise of a sound discretion by the court, and not a matter of right. No such application, or any application, to set aside that interlocutory decree, and reopen that issue, has ever been made in the case. Such applications should be promptly made, or they should not be granted. Seventy-five days, including extensions granted by the court, against the wishes of complainant, elapsed before the general answer to the merits in bar was filed.

During all that time, not only, was no such application, nor any application, made, to set aside the decision, and interlocutory decree entered therein, and reopen that issue, but none has at any time since, to this day, been made, and the interlocutory decree adjudging the plea false, and overruling it, on that ground, now is in full force, unaffected by any order made, or even by any application for an order vacating it, or reopening the issue. On an application, had any been made, the complainant would have been entitled to be heard. It is not an *ex parte* proceeding. (*G. P. Co. v. C. V. P. Co.* 6 Sawy. 529).

The respondent not only did not apply for a rehearing on the plea in abatement, but, in the face of the ruling, and of the interlocutory decree adjudging it to be false, and in defiance of it, without leave of the court, denied in her answer the allegations of the bill as to citizenship, and thereby sought in that form, without leave of the court, to retry the issue. The questions having been tried and adjudged on the plea in abatement, and that judgment remaining in full force, the complainant was not required, or expected, to put in evidence upon this point under the general issue. He was entitled to rely on the determination, already made, until the issue should be again reopened in some proper form, and especially is this so, since the question of the finality of the decree for this case had been determined in an early stage of the proceedings, when raised upon affidavits. It cannot be presumed that complainant tried the case on the question of citizenship, in the same manner, or upon the same testimony, as he would have done, had the issue been reopened in some proper form.

1885.]

Opinion of Sawyer, C. J., concurring.

Not only is the view expressed upon this point correct upon principle, but it is the settled doctrine of the supreme court. In *Grand Chute v. Winegar*, 15 Wall. 371, the eighth plea embraced the same matters which had been already set up and passed upon in a plea in abatement, and the court said in regard to it: "*A party having his plea in abatement passed upon by a jury and found against him is not permitted to set up the same matter in bar and again go to the jury upon it.*" And it, certainly, cannot make any difference whether it is passed upon by a jury or by the court, where no new trial, or rehearing, has been granted.

In the former decision we said: If the question "can be raised again in the general answer on the merits, there would be no use of a plea in abatement. Such a plea, upon that practice, would only obstruct and prolong the proceedings, and increase the expenses of litigation, without any possible advantage to be gained thereby. The parties are entitled to an opportunity to have an issue once tried, and determined. If, through negligence, or otherwise, they do not present their evidence, or all of their evidence, the fault is their own, and they must abide the consequences." (10 Sawy. 669).

The provision of section 5 of the act of congress of 1875, relied on by respondent, that "if it shall appear to the satisfaction of said circuit court at any time after such suit has been brought" that it does not involve a controversy properly within its jurisdiction, it shall be dismissed, doubtless means when it shall appear in some proper mode, or form, recognized by the rules of law, and regularly established practice of the court. It does not mean that the point may be suggested at any time, or in any mode, outside the regular course of the established practice of the court, and tried over and over again, whenever and however the party choose to suggest it. Such a loose mode of proceedings would be intolerable. It often happens, that the defect regularly appears in the record, as where there is a want of proper allegations in the bill, but it has not before attracted the attention of the court, or where it appears in evidence, upon the issues, properly, open for decision. Whenever

Opinion of Sawyer, C. J., concurring.

[December,

this is the case, or whenever the defect is made to appear to the court, in any stage of the proceedings, in its established course of procedure, the court will dismiss the case. This was always the rule on questions of jurisdiction, and the statute but gives express sanction to it, and requires its enforcement by the court, of its own motion, whether counsel suggest it or not; without, however, attempting or professing to change the regularly established forms of procedure, by means of which the issues shall be developed and tried, and by means of which the defect shall be made to appear. It is as important now to the due, convenient, economical and speedy administration of justice, that questions of jurisdiction, where they do not appear upon the face of the bill, should be determined upon pleas in abatement before going at large into the merits of complicated cases, requiring long, tedious, and expensive trials, as it ever was. Any other practice would not only be extremely inconvenient but often intolerably oppressive. We are fully satisfied with the former ruling on the point, and adhere to it. That the issue on the plea in abatement was properly determined in the case there can be no doubt, under the decisions of the supreme court. It is settled by that tribunal, that the burden of proof on the plea was on the defendant. (*De Sobry v. Nicholson*, 3 Wall. 423; *Sheppard v. Graves*, 14 How. 505; *Same v. Same*, Id. 512, 513).

And there being no testimony to support the plea, it was, properly, adjudged false, and overruled.

Whether a party has the right, under the fourteenth amendment, to elect to retain his citizenship of the state of his birth or adoption, after he has taken up his residence temporarily, or, permanently, in another state, is a question which, under the views adopted, we are not now called upon to determine. But see on this point the observations of the court in *Sharon v. Hill*, 10 Sawy. 673, and the cases in support of the affirmative of the proposition, there cited, from the decisions of the United States supreme court. If one has a right to retain his former citizenship, after so becoming a resident of another state, then, even upon the imperfect evidence offered by the respondent, and disregarded by

1885.]

Opinion of Sawyer, C. J., concurring.

us at the hearing, there can be no doubt that Sharon was, in fact, a citizen of Nevada at the institution of the suit, and that he so continued.

The only remaining question of law to be decided, is, as to the effect of the findings and judgment of the superior court, set up in the supplemental answer.

At the time leave was given to file the supplemental answer, the court was of the opinion that the matter set up as *res adjudicata* constituted no defense to the bill. But as it could not be known what view the supreme court might take, it was thought that respondent, in case of an adverse decree, would be entitled to have the matter in the record in such form as to be available in the supreme court on appeal, in case this court should be found to be in error upon the point. The application for leave to file a supplemental answer, was, therefore, granted, and the point left open for further consideration on the final hearing.

The court denied the motion for a stay of proceedings till the judgment in the state court should become final, for the reason, that, to do so, and thus give effect to the state judgment, as *res adjudicata*, would, in effect, be to arbitrarily turn the complainant over to the state court for his remedy, in a matter wherein the constitution and laws of the United States gave him an absolute, unqualified right to seek his remedy in this court. To have stayed proceedings, as asked, would have been equivalent, in its results, to dismissing complainant's bill, and leaving him only such remedy, as the state courts afford.

Do the findings and judgment entered therein, set up in the supplemental answer, now pending in the supreme court of the state upon a suspensive appeal, constitute a final determination of the rights of the parties, in such sense as to make them *res adjudicata*, and available, as such, in this suit, as matter of estoppel? We are fully satisfied that they do not. The effect of a judgment final as to the subject matter litigated, and adjudged, is prescribed in sections 1908 and 1911 of the code of civil procedure of the state of California, and is the same as had been established by the decisions of the courts before it was carried into the code.

Opinion of Sawyer, C. J., concurring.

[December,

To constitute *res adjudicata*, in the sense, and with the effect, indicated, the judgment should be *final*, not only as to the court in which it is rendered, but, also, final as to the subject-matter, and not subject to be set aside on motion for new trial, or on appeal. Judgments are said to be final in two senses—final as to the court in which they are rendered, so as to be subject to appeal, and final *as to the subject-matter upon which the judgment is rendered, so as not to be open for further consideration or modification in the tribunal wherein it is rendered, or in any other*. This distinction is, clearly recognized in the law in this state, and elsewhere.

In *Hills v. Sherwood*, 33 Cal. 478, the court, upon this point, says: "A judgment may be a final adjudication in different senses. It may be final as to the court which rendered it, *without being final* as to the subject-matter. 'The last decree of an inferior court is final in relation to the power of *that court*, but not in relation to the property itself, unless it be acquiesced in.' (*United States v. Schooner Peggy*, 1 Cranch. 103.) Although a judgment may be final with reference to the court which pronounced it, and as such be the subject of an appeal, yet it is not final, with reference to the *property or rights affected*, so long as it is subject to appeal, and liable to be reversed." Under the code, "a judgment is the *final determination of the rights of the parties* in an action or proceeding." Code Civ. Proc., sec. 577—that is to say, final as to the subject-matter.

The code recognizes the distinction as to judgments final as to the subject-matter, and final as to the courts rendering them. Thus, section 936, code of civil procedure, provides that "a judgment or order in a civil action, *except when expressly made final by this code*, may be reviewed as prescribed in this title, and not otherwise."

"*When expressly made final by this code*" means, of course, final as to the subject-matter—final and conclusive of the rights of the parties involved. But section 939 provides that "an appeal may be taken: 1. From a final judgment in an action," etc.; "2. From an order granting or refusing a new trial." See, also, section 963. In these sections it is equally obvious that the word "final" means

1885.]

Opinion of Sawyer, C. J., concurring.

final in the other sense—"final" only as to the action of the court rendering it.

It will be seen that independent appeals are given in the same case—an appeal from the final judgment in the case, and an appeal from an order granting or refusing a new trial therein, and the several appeals are, in practice, frequently taken at different times, the appeal from the judgment being often first taken, and in such cases generally before the motion for a new trial has been acted upon in the court below.

Section 946 provides that "whenever an appeal is perfected as provided in the preceding section of this chapter, it stays all further proceedings in the court below upon matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment."

And section 1049 expressly provides that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." By the express terms of this section, therefore, a judgment is not final, as to the subject-matter—is not a final or conclusive determination of the rights of the parties, not only "until the final determination on appeal," but where no appeal has been taken, "until the time for appeal has passed." Until the time indicated, the action is deemed to be pending; that is to say, remains inconclusive, not finally determined, and liable to be changed or altogether vacated and annulled.

The action is, therefore, still pending, and the subject-matter remains *sub judice*. In *Sanger v. Newhall*, 92 U. S. 761, the supreme court held that the lands within the exterior limits of a fraudulent Mexican grant, containing four or five times the amount purported to be granted, were *sub judice*, and not liable to any other disposition until the final judgment of the supreme court on appeal rejecting the grant. The judgment in the state court set up is still pending upon appeal—perfected, as provided by the statute in such mode, as to stay all further proceeding on it, except to

Opinion of Sawyer, C. J., concurring.

[December,

prosecute the appeal and a motion for new trial. By the express terms of the statute the action is still "pending" and undetermined. The litigation of the matter in question is not ended in the state court. It is still flagrant. The subject-matter is still *sub judice*, and a matter still *sub judice* cannot possibly be *res adjudicata* in any proper sense of that phrase. To say that a matter *sub judice* is at the same time *res adjudicata* would be a contradiction of terms. The two conditions, with reference to the same subject-matter, cannot possibly co-exist. Consider the consequences that might follow from the opposing view. Should this bill be dismissed on the plea of *res adjudicata* relied on, and the decree be affirmed on appeal, the judgment in the state court set up might afterward be reversed, and the case remanded for new trial, or a new trial be granted in the superior court, when the defendant in this case would doubtless endeavor to set up the decree of this court as *res adjudicata* in the case in the state court, and seek a favorable judgment on that ground. Should she succeed, there would be two final and conclusive decrees, based upon *res adjudicata*, where there would have been no final adjudication at all on the merits.

A doctrine that may lead to results so absurd cannot be reasonable or the true one. But the effect of a judgment of a state court, suspended by an appeal, under the laws of California, is settled by the supreme court of the state in numerous cases, even before the adoption of the provisions of the code herein cited, and now in force. Thus, in *Knowles v. Inches*, 12 Cal. 215, the court says: "This judgment, *suspended by appeal, cannot be considered as conclusive evidence of the fact of title*, even without reference to the manner in which it was obtained." So in *Woodbury v. Bowman*, 13 Id. 635, the court says: "The evidence offered on this point seems to have been the judgment roll in the suit of *Mokelumne Hill Co. v. Woodbury*, which cause was then pending in this court upon an appeal," etc. "We think it was properly rejected; an appeal having suspended the operation of the judgment for all purposes, it was not evidence on the question at issue even between the parties to it."

1885.]

Opinion of Sawyer, C. J., concurring.

So, also, since the adoption of the code, in *Murry v. Green*, 64 Cal. 369, the court says: "While the appeal from the judgment in *Porter v. Woodward et al.* was pending, the operation of that judgment for all purposes was suspended, and it was not admissible in evidence in any controversy between the parties." (Freeman on Judgments, 328; *Woodbury v. Bowman*, 13 Cal. 634.)

Thornton v. Mahoney, 24 Cal. 569; *McGanahan v. Maxwell*, 28 Id. 91, are also to the same effect. See, also, *Glenn v. Brush*, 3 Col. 26, and the numerous cases there cited.

Thus the effect of an appeal upon a judgment of the state courts of California, as *res adjudicata*, is settled by the decisions of the supreme court, independently of the present provisions of the code on the subject. But there can be no possible doubt, it seems to us, under the provisions of the present code cited, that a case upon appeal is still pending—still *sub judice*—until finally decided, and that it cannot be regarded as *res adjudicata*, or as having any effect as evidence.

The effect or value of a judgment in the state court is, therefore, fixed by the code, and the decisions of the supreme court of the state of California. The effect, or value, of a judgment of a state court, in this court can be no greater than in the State court, as determined by the laws of the state. (*Mills v. Duryee*, 7 Cranch. 481; *Hampton v. McConnell*, 3 Wheat. 234). This being so, it will be unprofitable to examine the few cases cited from other states, arising under a different practice, and presenting different conditions, to support the opposing view.

It, also, appears by the evidence, and it has been repeatedly stated by respondent's counsel during the argument of this case, that a motion for a new trial has been made by defendant, Sharon, in the case of *Sharon v. Sharon*, set up in the supplemental answer, which said motion is still pending, and undetermined, in the said superior court.

The judgment in that case, therefore, is also, still subject to be set aside in the court of original jurisdiction, and subject to many contingencies before it can, possibly, be con-

Opinion of Sawyer, C. J., concurring.

[December,

clusive on the rights of the parties. A new trial may be granted, even in the superior court, on the ground of the insufficiency of the evidence to support the findings, upon newly discovered evidence, and on many other grounds, and the granting of a new trial would put an end to the judgment. If denied in the court of original jurisdiction, there may be, as we have seen, a separate and independent appeal from the order denying a new trial, to the supreme court, and such order may be reversed, and a new trial ordered, on any of the grounds suggested, and thus the judgment be vacated. On a motion for new trial, and on appeal from an order denying it, the sufficiency of the evidence may be reviewed, and a new trial granted for want of sufficient evidence to justify the verdict or findings.

The supreme court of California has also, recently, determined the effect of a motion for a new trial upon the finality of a judgment, under the practice in California, in *Gilmore v. American Cent. Ins. Co.*, 65 Cal. 65, 66, the last volume published. The court says: "Although no appeal had been taken from the judgment within statutory time, proceedings were pending upon a motion made by the defendant in the case to vacate the judgment and grant a new trial. That motion subjected the judgment to be reversed, and made it liable to be set aside. The judgment was, therefore, not final, in the sense of the stipulation as to the right of the parties affected by it, and could not become so until the motion for new trial had been disposed of." (*Hill v. Sherwood*, 33 Cal. 474.) "While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended; there is no finality to the judgment in the sense of a final determination of the rights of the parties, though it may have become final for the purposes of an appeal from it.

To hold that a judgment subject to so many contingencies—liable to be set aside in so many ways—is *res adjudicata*; to have, finally and conclusively, determined the rights of the parties in such sense that they are no longer open to question in any other proceeding, or tribu-

1885.]

Opinion of Sawyer, C. J., concurring.

nal, would be but little short of absurd. It might as well be held that the mere bringing of an action would conclude the rights of a party to litigate the same subject-matter in any other jurisdiction.

Assuming, therefore, but without deciding the point, the subject-matter of the suit and judgment relied on, to be identical with that in this suit, in such sense as would render a judgment final as to the subject-matter, *res adjudicata*, yet in the present condition of the judgment it is still *sub judice*, and not *res adjudicata*. And the finding and judgment in no degree estop the complainant from litigating the matter in this case. The defense of *res adjudicata* is overruled.

But if the judgment were final, as to the rights of the parties, I am by no means satisfied that the complainant would be estopped by it *in this suit*. There are many strong reasons why he should not be. But it is unnecessary to determine that question now. I only refer to it because my associate has indicated his views upon the point, and I am not now prepared to concur in the views expressed. I, therefore, reserve my opinion upon the question until it properly arises for judicial determination, and until we can have an opportunity for its full discussion, and mature consideration.

I shall now call attention, very generally, to some of the salient points developed in the testimony, and state my conclusions on the material issues of fact, but leave the full discussion of the evidence to my associate.

The great issue of fact in the case, is, whether the complainant signed the alleged written declaration of marriage set out in the bill? As to this issue, but two parties testify, who profess to know—others probably do know—whether he did or not, and these parties are the complainant and respondent themselves—the apparent parties to the contract.

The complainant, in the most positive and unequivocal language, denies that he executed the instrument, or that he ever saw it, or heard of it, or heard of any claim of wifehood by respondent under it, or otherwise, till about the time of

Opinion of Sawyer, C. J., concurring.

[December,

his arrest for adultery, on the complaint of one, Neilson, acting in concert with respondent, on September 8, 1883—more than three years after its date, and more than a year after the stipulated time for secrecy had expired—and that he never, in his life, saw the instrument until he obtained an inspection of it in November following, under the order of one of the state courts. He, also, testifies that, according to the best of his judgment, the signature to the contract was not written by him. He is as “positive on the point as human judgment can dictate.” On the other hand, the respondent, as positively, and, unequivocally, testifies, that complainant did execute the contract; that she wrote it at his dictation, in his presence, and that they both signed it in the presence of each other.

They both testify as to matters in regard to which, they, respectively, have actual knowledge, and upon which they cannot, possibly, be, innocently, mistaken; and matters, which could not well have been forgotten, or misrecalled. One or the other, therefore, must have, knowingly, testified to a falsehood. There is no reasonable ground for escaping this conclusion. This being the case, the duty, is devolved on the court of determining, so far as it is possible to do so, from all the evidence, and the intrinsic probabilities arising out of the known, or undisputed facts, and facts satisfactorily proved, which party has testified to the truth, and which to the falsehood.

The complainant is a well known business man, of more than thirty years' standing, as generally, and, thoroughly, known here as any man in the United States. There is nothing to throw a doubt upon his character for truth and veracity, except as it arises out of the testimony in this case, directly, or inferentially, contradicting his own. Of the respondent we know much less—indeed, little beyond her own account of herself—but as to her, also, there is nothing to impeach her character for truth and veracity, beyond the testimony in the case contradictory of the testimony given by herself, the character of her testimony, the unusual and unsatisfactory tone and manner in which it was given, and such intrinsic probabilities and improbabilities

1885.]

Opinion of Sawyer, C. J., concurring.

as arise out of her testimony, and the other testimony introduced.

Conceding, then, for the purposes of the case, that the parties, at the outset, stand upon an equal footing, as to character for truth and veracity, their naked statements are equally balanced, and we must determine from the other evidence, and the probabilities arising out of it, on which side is the preponderance.

Under the circumstances the inquiry, naturally, suggests itself to the mind, to what extent are these parties contradicted, or corroborated upon material matters by the direct testimony of other credible witnesses testifying with regard to the same material facts? Upon examination of the testimony, I do not find that the complainant, Sharon, has been directly contradicted by other witnesses having positive knowledge of the facts, as to any fact material to the case to which he has positively testified, unless, upon some points, he may be regarded as, inferentially, contradicted by Mrs. Pleasants, who is as deeply implicated in the conspiracy, if conspiracy there be, as the respondent herself; and, in view of the circumstances disclosed, whose testimony must be taken with a considerable degree of caution.

On the other hand, the respondent has been directly contradicted, on many material points, as to her acts performed, and declarations made, from 1880 to 1883, wholly inconsistent with the idea that, at those times, she considered herself to be the wife of complainant.

Such contradictions in many important matters, which I shall not take time to enumerate, are found in the testimony of Mrs. Bacon, Mrs. Morgan, Mrs. Kenyon, Mrs. Millett, and Mrs. Mary Brackett; and as to an important matter, in some aspects of the case—the time of the opening of Martha Wilson's restaurant—by several gentlemen of unimpeachable character, supported by contemporaneous entries in their account books.

Respondent, it is true, now sneers at all these female witnesses, and indulges in very uncomplimentary remarks concerning them, but they were at one time, manifestly, from her own testimony, more or less intimate with her, and

Opinion of Sawyer, C. J., concurring.

[December,

to a considerable extent enjoyed her confidence and society, and to that extent, by her past conduct and acts, before the litigation was entered upon, they have her own endorsement. There is nothing else, other than her contradictions, and their association and connection with this case, disclosed in the evidence, to discredit, generally, their testimony. The fact of so many witnesses among her former associates—*ante litem motam*—testifying directly contrary to respondent upon material matters, about which they cannot well be mistaken, tends strongly to impeach her credibility, and is worthy serious consideration in deciding the great point in issue, thus, otherwise, left so equally balanced by the testimony of the two parties themselves. Besides, the whole tone and manner of testifying by respondent, and the inherent character of the testimony given by her, is, extremely, unsatisfactory. The tendency is not by any means to inspire confidence.

The complainant admits that he has known respondent from August, 1880, and respondent says, that she first met complainant in the spring of 1880, but she cannot fix the date; and between that time and August 25, that she had several interviews with him, but cannot tell how many—one of which was at the Baldwin hotel, shortly before she went to the Galindo hotel, at Oakland. The interviews, other than at the Baldwin, were either on the street, near the Bank of California, or at complainant's office, over the Bank of California. She cannot tell whether the interviews were once a month or oftener. As near as it can be made out from her testimony, she did not go to the Galindo, until some two or three weeks, or more, after the incident of taking laudanum at the office of a prominent attorney, which was on May 10, 1880; and she does not know whether any one of the interviews with complainant took place before the happening of that incident. I think, therefore, it may be assumed, that the acquaintance commenced, and all the interviews occurred after May 10, and, consequently, that there were but very few of them between that date and August 25. As I understand her testimony, she does not, positively, identify more than two visits to complainant's

1885.]

Opinion of Sawyer, C. J., concurring.

office, which were had at his suggestion. At one of them, she says, that he proposed to give her one thousand dollars a month, and the use of a horse, if she would consent to be his mistress. She so understood the proposition, and declined it, saying he had mistaken her character, and that he could obtain other women to serve in that capacity for a much smaller sum.

She says that he then proposed marriage, which she accepted, and came to meet him again, by appointment, on August 25; that she arrived a little late, and found complainant somewhat excited and nervous, on that account, as he was going to Virginia City, Nevada, on that afternoon; that he had a table with paper, pens, and ink on it, and directed her to sit down and write as he dictated, which she did, and then wrote, at his dictation, the instrument in question, signing where he directed; that he had a small book in his hand at the time, which he consulted, and seemed to dictate from it, and a number of large books, that looked like ordinary law-books, from which he read passages, showing that such marriages were lawful, and cases in which they had been sustained, and in which the wife had obtained property as such; that they stopped and talked, discussing matters from time to time as they proceeded; that it was all written at one sitting, and no part rewritten; that they were engaged in it, it might be, an hour, an hour and a half, or perhaps two hours; that when it was finished complainant came round beside her, asked her if she was satisfied with it, and signed it, adding the words, "Nevada, Aug. 25, 1880;" that she was surprised at that mode of marriage, and so expressed herself, and said, "That can't be our marriage certificate, senator;" that complainant said that it was all right, and as he was going away that afternoon, directed her to take it home and copy it all over nicely, and, when he returned, he would sign the new copy for her, and the rough one then signed, he would keep for himself; that she then left with the document, and returned to the Galindo hotel at Oakland, and she supposes he went to Virginia. At all events, she never saw anything more of him till some time after September 9. This is her account of the courtship

Opinion of Sawyer, C. J., concurring.

[December,

and marriage, which is, positively, denied by complainant. There is no evidence of any kind, that she ever made a neat copy for them to execute on complainant's return, as she was directed to do, or that any copy was ever executed for complainant, or, that the matter of making a neat copy was ever afterward alluded to between them. The books alluded to were, doubtless, intended to be the pocket edition of the California civil code, and some volumes of reports.

But Mr. Dobinson, the private secretary of complainant, and who, for years, occupied Sharon's rooms in that capacity, and who was perfectly familiar with all furniture and fittings up, testifies that no such books as described were kept in the office; that he would have seen them had they been there, and that he did not see any such there at that, or any other time. They could hardly have been in the office without his knowledge, and this affords a strong presumption that no such books were there, and, to that extent, is in conflict with the respondent's testimony on this point, and supports the testimony of complainant.

I think it must be admitted, that there is a strong intrinsic improbability that such an extraordinary contract, upon so short, casual, and exceptional an acquaintance, without consultation with, or knowledge of, her brother and numerous other relatives and friends, should be clandestinely entered into in such an extraordinary manner, by an honorable and virtuous young lady of twenty-seven, so intelligent and shrewd, and so well acquainted with the world as the respondent has demonstrated herself to be.

And it is no less intrinsically improbable, that a man of complainant's experience, wealth, and position, should enter into so strange a contract, with an honest purpose of honorable marriage, while there was no better reason for departing from the ordinary course of matrimonial alliances than has yet been suggested; and it seems, also, still more improbable that a man of complainant's knowledge of the world, and shrewdness, would, at his age, place himself in so embarrassing a position—put his wealth and position at such hazard—from the basest of motives, and with a delib-

1885.]

Opinion of Sawyer, C. J., concurring.

erate purpose, so infamous and shocking to the moral sense, of deceiving respondent and accomplishing her ruin. A motive and purpose, so infamous, ought not to be attributed to a man hitherto holding a respectable position in society—such a position as would lead an intelligent lady of good connections and social position, knowing his standing, to marry him—against his solemn oath to the contrary, except upon testimony, reasonably, satisfactory to the mind—certainly, not, upon the unsupported testimony of an unusually intelligent, and experienced party, capable of entering into a secret arrangement so extraordinary, upon so slight an acquaintance of exceptional character, without consulting with, or the knowledge of, her numerous relations and friends, including a brother, who had theretofore been to her all that a brother could be to a sister, and who were readily accessible, and in habits of daily intercourse with her—that brother, at the time, living in the same house with her, and serving as her protector. Again, according to respondent's own account, this interview and transaction having taken place, somewhere from noon and afterward, on August 25, at its conclusion the parties separated, she going to her residence at the Galindo hotel, in Oakland, and complainant, as she supposes, to Virginia City, Nevada, leaving by the 3:30 P.M. overland train—the only means, at that time, of travel between San Francisco and Virginia.

Respondent remained at the Galindo hotel until it was destroyed by fire on, or about, September 9, when she returned to the Baldwin hotel in San Francisco, and remained till the latter part of September. The complainant remained in Virginia until some time after the destruction of the Galindo hotel in September, and returned to San Francisco between the date of that event and September 25—the date not now being definitely fixed.

He called on respondent, she says, at the Baldwin, before September 25, but she cannot say how long before. It was, probably, but a short time before September 25, for on that day complainant was active, and urgent for an interview, he having on that day written her several notes—some of them in evidence—I think, four in all—seeking an interview—ad-

Opinion of Sawyer, C. J., concurring.

[December.]

dressed at the heading, "*My Dear Miss Hill.*" And immediately after that, she removed to the Grand hotel, without even consulting with her brother, *who was with her at the Baldwin*, or informing him of her contemplated movement. Upon learning of the change, however, he immediately followed her to the Grand, and for her protection took up his residence at that house, thereby manifesting the deep interest he felt in her welfare. During the whole month, from the date of the alleged marriage contract, August 25, to September 25, there was no communication by word, letter, or telegraph between complainant and respondent, except the single call by complainant at the Baldwin at some time after his return from Virginia City, and before September 25, the date of which is not fixed.

Respondent did not even inform complainant of the burning of her residence, and her consequent removal. She did not intimate to her newly acquired husband, where she could be found on his return from Virginia City, and he was compelled to send his Chinese servant to Oakland, and elsewhere, to learn of her whereabouts. So that, it is probable, that the meeting, at the Baldwin, was not very long prior to September 25, when complainant became so active and urgent for an interview. Thus a month, or nearly so, intervened between the entering into this extraordinary marriage contract, and any further communication, or effort to communicate, between them. It does not appear that prior to complainant's return from Virginia City, there had been any consummation of the marriage by marital intercourse.

The respondent, according to her own account, did not take sufficient interest in her newly acquired husband, to communicate with him, or to inform him, of her misfortune in being burned out, and compelled to remove, and where he could find her on his return; and gave as a reason for her neglect, that she did not conceive it necessary for wives to run after their husbands, and, that, she supposed he would find her, if he wanted to, on his return from Virginia City.

There was a daily mail, and at all times telegraph communication between San Francisco and Oakland and Virginia City, and yet nothing passed between these newly

1885.]

Opinion of Sawyer, C. J., concurring.

married parties during nearly, or quite, the whole month, usually designated, as the honeymoon, and under circumstances wherein we should certainly, expect some written or other communication. These first *private* notes of the complainant after the alleged marriage, were addressed, in the heading, "My Dear *Miss Hill*," and only intimated the desire of an interview for her benefit, saying, "something I want to tell you about, of interest to yourself." There is nothing in the notes breathing the spirit of a husband newly married, or even of half a century's standing. To my mind, the conduct attributed to both parties, by the respondent, during the month following the alleged marriage, is intrinsically, improbable, had there been a marriage contract as claimed. I cannot reconcile such a course of conduct with my observation, and experience, of the course of human action, and the influence and operations of human affections. It seems incredible. It is, of course, possible that two parties can be so constituted, that they could make such a contract, and conduct themselves, under the circumstances, and in the manner indicated during the month following marriage; but it is highly improbable, not to say, utterly, incredible, even when considered by itself, unaffected by other collateral facts; and such improbability is to be considered, and it should receive its due weight in connection with the other facts developed in the case.

We now come to the period from September 25, 1880, to November, 1881, while respondent resided at the Grand hotel, and while the relations of the parties were most intimate, harmonious, and cordial; and afterward, from the time of respondent's expulsion from the hotel, in December, 1881, until September 8, 1883, when complainant was arrested, on a charge of adultery upon the complaint of Neilson, and at the instigation of respondent, *by means of which publicity was first given* to respondent's claim of wifehood. My associate has fully discussed the evidence, and facts relating to this period, and I shall not go into particulars, but only state some facts appearing in the evidence, with a view of drawing the proper inference therefrom.

One distinguishing fact, is, that the alleged marriage was

Opinion of Sawyer, C. J., concurring.

[December,

kept secret, not only during the two years provided for in the contract, but for a year, or more, afterward, as it was never made public until the time of complainant's arrest—September 8, 1883. Secrecy is always a badge of suspicion, and fraud, and especially so in matters of interest to society, and which public policy and the laws of well-regulated society require to have general publicity. Withholding knowledge of the relations of the parties from the public, and, especially, from those, who have a right to be informed upon the point, and clandestine sexual intercourse, are strongly indicative of meretricious, and not marital relations. And to this effect are all the authorities upon the subject. The marriage and intercourse, in this instance, were kept profoundly secret from the public, and, so far as possible, from respondent's brother, and other near relatives, and, so far as we know, only revealed, if at all, to a few, who, to say the least, in view of the known facts, are of questionable standing, and who occupy an unenviable relation to the case; parties to whom such a revelation was not likely to be made in a case where a contract, in good faith, required secrecy, and where it was, studiously, concealed from those having a right to know, and who would be quite as likely to keep a secret if desirable to do it. Those relatives could, certainly, have had no motive to defeat the election of complainant to the senate, after he had become, so nearly, allied to them by marriage. There has been introduced in evidence a number of letters, and brief notes from complainant, addressed to respondent, while she lived at the Grand hotel, from September, 1880, to November, 1881, and during the year when the relations between the parties were the most intimate, and cordial—while respondent claims that they were happily, though secretly, cohabiting together as husband and wife. Of all these letters thus introduced—and if any were omitted it must be presumed that respondent would have offered all those favorable to her case—five appear to be addressed "My Dear Wife." These are, positively, declared by complainant to be forged and spurious, at least, so far as the word "wife" is concerned. But, waiving a discussion of that point in this

1885.]

Opinion of Sawyer, U. J., concurring.

opinion, it having been covered by my associate, not one of these letters, aside from the word "wife," contains a word that suggests the relation of marriage, or breathes the spirit a husband would be expected to manifest in a correspondence, however cursory, casual, or unimportant, with his wife. That word is, singularly, inconsistent with the tone and matter of the rest of these letters.

No, satisfactorily, authenticated word, or act, on the part of complainant, indicating the relation of husband and wife, or inconsistent with meretricious relations, during the whole three years from August 25, 1880, to September 8, 1883, appears in the evidence, or supported by any direct evidence, other than that of the respondent herself. On the contrary, the letters all breathe a different spirit—sometimes jocose, sometimes all business, and all, except the so-called "Dear Wife" letters, are addressed "My Dear Miss Hill," "My Dear Allie," or "My Dear A." The letters of earliest date—those written in the ardor of the waning honeymoon—only rise to the pitch of "My Dear Miss Hill." But these letters are fully discussed by my associate. I only refer to them for the purpose of drawing an inference.

There does not appear to be any good reason why, on one day, complainant should address his wife "My Dear Miss Hill," and on another day, "My Dear Wife," or why, in their secret correspondence, intended for no other eyes, a husband should not always recognize his wife, as wife. If he could trust her with *some such letters, and with the keeping of the marriage contract, why not with more?* But during all this period, these parties were dealing with each other in money matters, even in small amounts, *at arm's-length*. As early as December 5, 1880, but little over two months after going to the Grand, there was a stock transaction, wherein respondent drew a memorandum, which complainant signed, acknowledging that he held a hundred shares of Belcher for "*Miss Hill, at \$200 per share, to be paid for on delivery of the stock.*"* This was a private transaction between them,

* In the transcript of the short-hand notes of testimony reported by the master, the price appears \$200—there being no point between the 2 and the ciphers. This must be an inadvertent omission, for it is a matter of public history and notoriety that, at that date, the value of Belcher stock was, in fact, only about two dollars per share, as a reference to the official records of the San Francisco Stock and Exchange Board and the daily published reports of sales will show. But I take the price as I find it in the record. 8.

Opinion of Sawyer, C. J., concurring.

[December,

unknown to anybody, and *requiring no mask*; why this particularity, and care, in carrying on, and concealing under false names, a business transaction between husband and wife?

So, also, several of the notes from complainant to respondent, introduced in evidence, relate to moneys and accounts between the parties, which were nicely calculated, and balanced to a cent, on the apparent basis of five hundred dollars per month—the amount which respondent testifies her husband was paying her. This was not merely pin-money, but funds, out of which the wife of a man alleged by respondent to be worth many millions of dollars, with an income of from thirty thousand to one hundred thousand dollars per month, was to pay all her expenses, hotel bills, clothing, everything, and out of which, she says, she also purchased many articles of apparel for her husband—and the account, regularly, balanced, and settled, as though they were dealings between utter strangers.

Yet respondent was offered, according to her own testimony, double the amount to take the position of mistress—she being regarded as twice as valuable in that capacity, as in the capacity of wife. So, on November 7, 1881, the complainant paid the respondent seven thousand five hundred dollars in cash, and notes payable to the order of "*Miss Hill*"—the balance of which has been recovered by respondent against complainant in a state court since the commencement of this suit. This the respondent claims to have been paid in settlement of a prior money demand. Complainant denied it, and he accounted for it in that suit on an entirely different theory. But these facts show the course of dealings in money matters between these parties, at the very time when their marriage relations, if any such existed, were most harmonious and affectionate, while there *was no occasion between them for masking*—where no one else had occasion to know anything about the transactions, and even though private, they were dealings, ostensibly, if not in fact, between these parties in the names and character of William Sharon and S. A. Hill, and not in the names of Mr. and Mrs. Sharon, in the character of husband and wife.

1885.]

Opinion of Sawyer, C. J., concurring.

They were, ostensibly, dealings at "arm's-length" in money matters, sometimes of small amounts, between strangers. This is, certainly, not the ordinary course of transactions between husband and wife, brought up and educated in this country, imbued with American ideas; and, in view of our laws in relation to marriage, the legal *status* of marital property rights, and marital and domestic polity.

We naturally look for some recognition of the relation of wifehood from the husband in private transactions, correspondence, and intercourse, domestic, money, and otherwise, between husband and wife, other than the very few instances of the use of the word "wife" in the address of casual letters. We find none on the part of complainant in the relations between him and respondent, so far as they are disclosed to view—not one instance.

Turning from the conduct of the complainant to that of the respondent during all the time from August 25, 1880, till about a year after the time for secrecy under the clause in the contract had expired, *we find it equally barren of any well-authenticated act or word of respondent, public or private, in complainant's presence, or in addressing him by letter, indicating that she during that period, at any time, regarded herself as the wife of complainant.*

No witness ever heard her address complainant as husband, or any language indicating the existence of that relationship. We have a number of her letters, addressed to complainant during that time—private letters, intended for no eye but his—and he alone was interested in keeping the secret, and could, certainly, be trusted with an endearing, wife-like letter—be trusted with the keeping of his own secret—but none containing the word "husband" or its equivalent, or any reference to matters between husband and wife, which either would desire, for that reason, not to have brought to the knowledge of others. All of these letters are addressed "My Dear Mr. Sharon," "My Dear Senator," or "My Dear Sen."—not one "My Dear Husband." And there is not a line, or word, in any of them, that indicates any idea upon respondent's part that she was

Opinion of Sawyer, C. J., concurring.

[December,

the wife of the party to whom they were addressed. There are appeals of the most passionate and pathetic character to his sense of justice, to his generosity, to his manhood, but not one in the character of wife—not one addressed to him in the character of husband. But my associate has fully discussed these letters, and I need not dwell upon them, further than to draw the natural inference, and to say, that they are, in my judgment, wholly inconsistent with the idea that, at the time they were written, she thought, or supposed, she was the wife of complainant. It is inconceivable to me, that a woman of the spirit and temper everywhere displayed by respondent, conscious of honor and wifehood, under the circumstances, giving birth to some of these letters, could have written them to her husband, without reminding him, at least, of the sacred tie binding them together. Surely, to a man susceptible to the influences sought to be brought to bear upon him, an appeal to his honor, generosity, and manhood, would not be less effective coming from a wife, in the character of a wife, than from a mistress, in her character of mistress.

This failure to appeal to complainant, as husband, to address him as husband, and to claim the rights of a wife, in these *private* letters, written under the distressing circumstances under which respondent found herself, is inexplicable upon any theory that she, at that time, supposed she was his wife. The claim that she acted under the advice of the aged colored woman, Mrs. Pleasants, is incredible and unsatisfactory. All her womanly instincts, and her resolute and dominating spirit, in which she is by no means deficient, would have rebelled against such a submissive and pusillanimous course.

Again, she states, that on one occasion she concealed herself behind a bureau in her husband's bedroom, and remained there, while he and another woman occupied the bed together, and that she was greatly amused at what she witnessed.

Is it credible that a high-spirited and passionate woman, as respondent claims to be, and as she has on various occasions shown herself, in fact, to be, conscious that she was a

1885.]

Opinion of Sawyer, C. J., concurring.

scorned, and grossly injured wife, could quietly witness such an exasperating act on the part of her husband, and tamely submit? and that the incident would greatly amuse her?

So on another occasion, according to her own testimony, she concealed a young girl of eighteen behind the same bureau, in order that she might hear her husband call her wife, while she and her husband went to bed together. What need of taking such means to satisfy Mrs. Pleasants, or anybody else, of her being the wife of complainant, if she, at that time, had the evidence of the fact in a genuine written contract, supported by the so-called "Dear Wife" letters, then in her control? Are these the acts of a person conscious of being the wife of the party under such espionage? But what was said on that occasion, in those moments of dalliance, is not in evidence, and we do not know that she, even then, drew from complainant's lips the coveted appellation, "wife," under circumstances, where the most endearing terms were likely to be used.

So far as is shown by the evidence, therefore, there is no act or declaration, written or spoken, in the respondent's treatment of complainant during these three years, indicating that she supposed herself to be his wife, or that is not more consistent with the idea that those relations were meretricious rather than marital. The fact that she used complainant's carriage, as she says she did, is cited as evidence of treating her as a wife. But if there be any force in this, it is broken by the further fact, stated by herself, that complainant's mistresses have ever since been accustomed to freely use the same carriage, and be driven by the same coachman, in the same manner.

Complainant's admitted mistresses, therefore, seem to have been treated alike, and put upon the same footing, in this particular, with respondent herself.

But I need not dwell on points so fully discussed by my associate. Is it too much to say, that the whole course of conduct toward respondent, and on the part of respondent toward complainant, during those three eventful years, is in the highest degree improbable, had they been husband

Opinion of Sawyer, C. J., concurring.

[December,

and wife? Is it possible that a husband and wife, cohabiting, harmoniously, could so conduct themselves towards each other, and that during the first year of their married life?

There is strong evidence on the face of the alleged contract, itself, that it was written over the name of complainant after the signature had been written, and that parts of it, at least, were written after the paper was folded, and the signature before folding, showing that the signature must have been first written. Without enumerating the points, or discussing again the particulars pointed out by my associate, leading to that conclusion, there is enough in the appearance to render it, in a very high degree, probable, when considered by *itself* alone, without reference to the testimony bearing upon other points, that such is the fact. So, also, upon comparing the signatures with hundreds of signatures of complainant written from 1875 to 1883, conceded to be genuine, and the testimony of experts pro and con, it appears to be a better signature than any other of complainant's in evidence. It is smoother, more flowing, regular, artistic, and less cramped than the others, admitted to be complainant's. There is not another in all the genuine signatures in evidence, that contains all the distinguishing characteristics of the disputed signature. So the fact appears to me to be, after a careful comparison of the disputed signature with all others in evidence, in the light of expert testimony, and even without such light—some of the signatures having been enlarged by the microscope and photographic process, in order to show the prevailing characteristics more distinctly.

Several paying-tellers in banks, including the Bank of California, who had paid hundreds and probably thousands of complainant's checks, and others long in his employ, and having the best opportunity to become familiar with his signature, except his former employee, Cushman; also a number of the most skillful experts, testify, that the disputed signature, in this case, is not the genuine signature of complainant, Sharon. There are others, besides Cushman, of

1885.]

Opinion of Sawyer, C. J., concurring.

no special standing as experts, having less reason to be acquainted with complainant's handwriting, and Gumpel, who is a competent expert, who testify that they believe it to be genuine. To my eye, although I do not profess to be an expert, after a long and thorough examination and careful comparison of the numerous signatures in evidence claimed to most nearly resemble the one disputed—there are over three thousand in evidence—in the light of all the expert testimony, it does not appear to be the genuine signature of complainant. There is one remarkable fact that attracts attention. There are several examples of signatures written by the expert, Gumpel, at different times, at the request of different parties, professedly in imitation of complainant's signature, and written from memory, without any signature before him. The signatures thus written, as they were written, and copies of them enlarged under the microscope and by photographic process, are in evidence; and to my eye, after a careful, studious comparison, there is not one of them, written by Gumpel, that is not more like the disputed signature, than any one of all the numerous admittedly genuine signatures of complainant. Every one of those written by Gumpel contains all of the several peculiar and striking characteristics of the disputed signature, while not one of the genuine signatures of Sharon does. Some of Sharon's signatures contain one, and some another, of the peculiar characteristics of the disputed one; but no one contains all, or nearly all, of those characteristics, as Gumpel's do. This striking resemblance between the imitations of Gumpel and the disputed signature, may result from the fact, if it be a fact—but whether it be a fact or not, we do not know—that Gumpel took the disputed signature, assuming it to be genuine, as his exemplar, and practiced his imitations from that. If this was done, it would, intelligently, account for the similarity. In that case, however, it shows, conclusively, that Gumpel, at the time, fully appreciated all the peculiar characteristics of the disputed signature, and incorporated them into his imitations. That the peculiarities are found, both in the imitations by Gumpel, and in the disputed signature, it seems to me when pointed out, if not

Opinion of Sawyer, C. J., concurring.

[December,

before, must be clearly apparent to any tolerably correct and appreciative eye.

The document, it is conceded, was written by respondent, and is alleged by her to have been written at one sitting, no part having been written over; and with interruptions at various points by conversation—discussing the points as they rose during the writing; the time occupied being about an hour and a half, or, perhaps, two hours.

It was, manifestly, written with elaborate care in its mechanical execution. It is by far the best and most artistic specimen of respondent's penmanship exhibited in evidence. Not a word had to be erased, added to, corrected, or rewritten, except, in many instances, to shade more heavily, and apparently, with different ink. I think the experience of every one familiar with such work, will suggest that it is highly improbable that one could dictate from a book, and another, not accustomed to writing from dictation, sit down and write so extraordinary a document of such length while carrying on a conversation discussing the points, legal and otherwise, arising as they went along, without a single mistake requiring correction; especially so, when the last four lines are condensed into a smaller space by omitting several words found in the other corresponding parts of the contract, requiring to some extent, a reconstruction of the sentences, and also by contracting others, as by using the character "&" for the word "and," in order, apparently, to accommodate the matter to be inserted to the available space. And neither the party dictating nor the party writing would be likely to know in advance how much it was necessary to contract and condense. If this contract was written in the manner and under the circumstances stated, I think it must be conceded, that it is a feat of accurate work, that must attract attention—a very extraordinary performance.

The ink of the signature appears to be different from the ink in which the contract is written, while there seems to be two kinds of ink in the contract, making three in all. According to Dobinson's testimony, but one kind of ink was in the office other than copying-ink and red ink; and accord-

1885.]

Opinion of Sawyer, C. J., concurring.

ing to Piper, the ink was not of the kind used in the office, and the inference arises, that, it is highly improbable, that the instrument could have been written in complainant's office, or in the manner as stated by respondent.

Taking the document itself, as it appears upon its face, comparing the signature with the numerous genuine signatures of complainant in evidence, in the light of the expert testimony, and of the testimony of respondent, as to the circumstances and mode of its preparation and execution, and the positive testimony of complainant, unequivocally denying the execution of the contract, and considering all the testimony directly bearing upon this point, without reference to collateral testimony on other points in the case, and, I think, to any candid, unprejudiced mind, accustomed to consider evidence, and able to appreciate the relation of one set of facts to another, it will appear to be, in the highest degree, improbable, that this signature to the alleged marriage contract is the genuine signature of the complainant; and, whether the signature be genuine or not, still more improbable, that it was subscribed to the alleged contract after it was written.

It further seems highly improbable, that respondent should have confided so important a secret as the marriage contract to such persons as the two colored women, Mrs. Pleasants and Martha Wilson, to Vesta Snow and Nellie Brackett, and have concealed it from her brother, uncle, aunt, and other much more reputable friends, having a far greater interest in her welfare. It is, also, highly improbable, that her counsel would have failed to call her friends, and, at least, offer to show their knowledge of the contract, as a part of the *res gestæ*, had it been exhibited to them, or had any knowledge of its existence ever been brought to their notice. Their absence from the witness-stand, and from any sort of connection with the trial, is extremely significant. Counsel for respondent were not at all backward in offering, and, vehemently, pressing upon the attention of the court, any testimony supposed to be favorable to their client's cause. This failure by her to produce the contract for the inspection of respondent's friends, as a vindication of her

Opinion of Sawyer, C. J., concurring.

[December,

conduct, which caused them great uneasiness, raises a violent presumption, that it was not at the time in existence, and gives rise to a further strong improbability, that the contract is genuine.

The discussion of the "Dear Wife" letters I shall leave wholly to my associate.

While section 75 authorizes the making of a "declaration of marriage" substantially in the form of the one in question, section 77 makes the positive additional provision that "declarations of marriage *must be acknowledged and recorded*, in like manner, as grants of real property." There is no exception. The declaration in question is neither acknowledged nor recorded, and in this important particular fails to conform to the statute. If the parties had the code before them, when this contract was drawn up, as stated, this provision, being on the same page, could not have escaped attention. It provides certain means of proof which public policy demands in matters so important to the interests of society. There, surely, could be no good reason for not having it acknowledged, even if it was not desirable to record it. There would then have been valid proof on its face of its genuineness. The fact that the declaration is neither acknowledged nor recorded, as is expressly required by the very statute under which it purports to have been executed, raises an implication against its genuineness, and affords another improbability that it was drawn and executed in the manner alleged by respondent. Surely when the statute itself provides for, and in the most positive, mandatory, terms requires, the evidence of the genuineness of the instrument indicated, it is not too much for the court, in the absence of both such acknowledgment and record, to insist that the other evidence of the genuineness of so extraordinary a contract of marriage should be of the most indubitable and satisfactory character.

To recapitulate, the results thus briefly suggested by the evidence, more fully elucidated by my associate: We start with a direct irreconcilable contradiction between the complainant and respondent, as to the execution of the alleged marriage contract—one affirming and the other denying its

1885.]

Opinion of Sawyer, C. J.. concurring.

execution—and the point to be determined is, which is right? Conceding the parties *prima facie* to stand upon an equal footing as to character for truth and veracity, the question of veracity between them must be determined from the other evidence in the case.

There is no other direct evidence upon the principal fact in issue, and we cannot know, absolutely, where the truth lies.

The scale must, therefore, be turned by the intrinsic probabilities arising out of the known facts, considered in their relations to all the other evidence in the case, and all collateral facts disclosed, from which the truth may be inferred.

We have, then, these several enumerated improbabilities, contradictions and other circumstances fairly suggested by the evidence:

1. The improbability that complainant, a man of experience, of known intelligence, reared with ideas such as prevail in this country upon the subject, should enter into so extraordinary a contract, in the extraordinary way indicated, with honorable intentions, without a stronger motive than any suggested for departing from the ordinary course in entering into matrimonial alliances; and the greater improbability, that he should do it with the basest, and most infamous purpose of deceiving, and, thereby ruining the respondent. Such infamous acts should not be attributed to him against his unqualified positive denial, except upon evidence, clearly, satisfactory.

2. The improbability that an honorable, and virtuous woman of the respondent's intelligence, spirit, and experience in the ways of the world, in easy pecuniary circumstances, as she claimed to be, of respectable connections, and good social position, upon so short an acquaintance of so exceptional a character, without consulting her brother—one who manifested so much interest in her welfare—other near relatives and friends, should enter, clandestinely, into so extraordinary a contract in so extraordinary a manner.

Opinion of Sawyer, C. J., concurring.

[December,

3. Had there been executed a contract of the character alleged, in the extraordinary manner stated, the improbability that both, or either, of the parties would, or even could have conducted themselves with respect to each other in the way we know they did, during the month, or nearly the whole month, following the execution of the contract—a course of conduct wholly at variance with our experience of human action, and the influence and operation of human affections, and human passions.

4. The improbability, that respondent would fail to make her marriage contract, if any there were, public for two years after its repudiation by complainant, who, having violated and repudiated the whole contract himself, could no longer expect respondent to comply with its requirements. And the further great improbability, that after her expulsion from the Grand hotel, and for a year after the time prescribed for secrecy had expired, she would neglect to make the contract public, and claim her rights under it; especially so, where the ignominious position in which the respondent was placed called, loudly, for publicity. And the still further improbability, that a proud-spirited and resolute woman, like respondent, would quietly submit and suffer in silence, under the circumstances of contumely in which she was placed.

5. The improbability, that the private correspondence of a husband with his wife, intended for no eye but her own, should generally be addressed, inside, to her by her maiden name, and, in no instance, manifest any of the sentiments which would be expected in letters from a husband to his wife, and, in the few instances in which he is claimed to have addressed her, as “My Dear Wife,” the word “wife” should be the only one in the letter indicative of that relation, and be inconsistent in tone, and matter, with every other part of the letter.

6. The improbability, that during all the three years next succeeding the date of the alleged contract, there should be no letter addressed by respondent to complainant, and no authentic instance of a verbal communication

1885.]

Opinion of Sawyer, C. J., concurring.

between them wherein respondent should address complainant as husband—no instance where there would be some claim or intimation that she considered herself as the wife of complainant, or in which some sentiment or thought should be expressed, from which it can be inferred that she entertained the idea of wifehood, while a number of letters are shown—in fact, all in evidence—which, in matter and form, are wholly inconsistent with the idea that she considered herself the wife of complainant.

7. The improbability, that during the time of a cordial and harmonious cohabitation, as husband and wife, if such there was, the parties should at all times deal with each other, in money matters, at arm's-length, and account together, from time to time, balancing to a cent on the apparent basis of five hundred dollars a month allowance, and that out of this pitifully small sum, comparatively speaking, the wife of a man of so great wealth should be required to pay all her expenses, rent of rooms to live in, hotel bills, clothing, ornaments, and other personal expenses incident to a lady in good society, when that husband had, before marriage, offered to respondent double the allowance to live with him in another capacity, of less respectable character.

8. The improbability, that respondent's important and vital secret should be confided to such parties as Mrs. Pleasants, Martha Wilson, and Vesta Snow, whose positions, in the most favorable aspects in which they can be viewed in connection with the circumstances developed in the testimony, are, at least, equivocal, and have been concealed from her brother, who had, theretofore, been to her all that a brother could be to a sister, and who remonstrated with her against her association with complainant; also from her uncle, who had manifested so great an interest in her, as to threaten physical punishment to complainant; from her aunt and her husband, and respondent's other relations and friends, and under the circumstances of ignominy in which she was placed, if revealed to them, that they, or she, herself, should have concealed it so long from the public.

Opinion of Sawyer, C. J., concurring.

[December,

9. The great probability, from the appearance of the alleged contract, and the intrinsic evidence disclosed on its face, that it was written after the writing of the signature, and after the paper had been folded; and the further great probability appearing from a comparison of the signatures to the alleged contract with numerous genuine signatures of complainant, and from a consideration of all the testimony bearing upon this point, that the signature was not, in fact, written by complainant.

10. The great probability, that respondent's veracity cannot be relied on, from the fact, that, respondent is, substantially, contradicted by Dobinson, as to there being books of the kind she mentions at the time of the alleged execution of the marriage contract in the office of complainant; by other credible witnesses as to the date of the opening of Martha Wilson's restaurant; and that she is directly contradicted as to the numerous acts performed and declaration made by her in 1880, 1881, and 1882, about which neither can be mistaken, wholly inconsistent with the idea, that, at that time, she supposed she was the wife of complainant, by Mrs. Morgan, Mrs. Millett, Mrs. Kenyon, Mrs. Bacon, and Mrs. Brackett, thereby discrediting her testimony on material points. Also, the improbability arising out of the unsatisfactory character of the testimony given by respondent, and the unsatisfactory tone and manner in which it was given.

11. The improbability as to its genuineness, arising from the fact that the alleged declaration of marriage was not "acknowledged and recorded in like manner as grants of real property," as is, expressly, required that it should be by section 77 of the civil code.

12. Secrecy is always, as we have seen, and especially in matters which the good of society, and public policy, require to be made public, a badge of suspicion and fraud. The secret acts of the parties in this case are *indicia* of meretricious, and not marital, relations, and give rise to a further probability that there was no genuine marriage contract.

1885.]

Opinion of Sawyer, C. J., concurring.

Without going over the particulars of the evidence so ably and satisfactorily discussed by my associate, I find these intrinsic improbabilities, probabilities, and these other weighty considerations disclosed in the case to be opposed to the testimony of respondent, and I am wholly unable, on the other hand, to find any sufficient deductions from the testimony in the case, to counterbalance them.

In my judgment, the weight of the evidence, even as presented in the case, without an inspection by the court of the original documents, largely preponderates in favor of the complainant, and, satisfactorily, establishes the forgery, and the fraudulent character of the instrument in question.

It would have been far more satisfactory to the court, if the original documents themselves had been introduced in evidence, instead of mere photographic copies, or if the court could have been permitted to inspect the originals, but this could not be done without compulsion, or upon such conditions, as respondent and her counsel, themselves, saw fit to prescribe, and to which the court could not submit. We have done the best we could, in view of the disadvantages under which we labored, in this particular, and if the respondent has suffered from a want of inspection of the originals by the court, and nearly all the witnesses—all except the witness Piper—it is the result of her own, and her counsel's acts. The inference that must be drawn from withholding an inspection, is, that their production would be injurious to respondent's case, and this inference only makes more certain the correctness of our conclusion, which is, sufficiently, obvious without its aid.

I am satisfied, after a most laborious and careful consideration of the evidence, that the instrument in question, the so-called "Dear Wife" letter in ink, and the other "Dear Wife" letters, the latter, at least, as to the word "wife," are not genuine; that they are forged and fraudulent, and that the alleged declaration of marriage set out in the bill ought to be canceled and annulled as a forgery, and a fraud.

The analysis of the evidence by my associate is so searching, exhaustive, and satisfactory, and his reasoning so convincing, that no further discussion can be desired. I feel,

Points decided.

[January,

that I can add nothing of interest, or that will give additional force to the argument, and but for the great importance of the case, and the widespread public interest manifested in it, I should have remained silent. Without further observations, therefore, I concur in the conclusions on the *material* points, reached, in the line of reasoning by which they are established, and in the decree ordered.

As the case was argued and submitted during the life-time of complainant, who has since deceased, the decree will be entered *nunc pro tunc*, as of September 29, 1885, the date of its submission, and a day prior to the decease of complainant.

THE UNITED STATES v. PATRICK B. SINNOTT ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JANUARY 11, 1886.

1. INDIAN SAWMILL.—Lumber made at the sawmill on the Grand Ronde Indian reservation, is in fact the "property" of the Indians thereon, and not that of the United States within the purview of section 3618 of the revised statutes; and the agent, subject to the instructions of the commissioner of Indian affairs, may dispose of any portion of the same and apply the proceeds to the support of the mill or otherwise for the benefit of the Indians, without reference to section 3617 of the revised statutes, requiring money received for the use of the United States to be deposited to its credit.
2. DOUBLE PAYMENT OF SALARY.—The superintendent of Indian affairs in Oregon returned to the department two vouchers for the payment by him of the salary of the agent of the Grand Ronde reservation for the second quarter of 1873, each being marked "triplicate," from which the accounting officers assumed that the salary was paid twice, and charged the agent with the amount of such payments in the settlement of his official accounts: *Held* (1), That on the face of the transaction it was apparent that these two papers were but parts of one voucher taken in triplicate, and that there was but one payment; and (2), that if there had been two payments, the agent, although liable for the excess, as an individual, as for money had and received to the use of the United States, was not liable therefor on his bond.
3. MONEY PAID BY AGENT WITHOUT AUTHORITY.—The defendant, Sinnott, employed a person on the reservation aforesaid, as "superintendent of farms and mills," and in reporting the fact to the commissioner, said that he did so at the instance of "some political friends," but there was really no necessity for the employment, and advised that it be disap-

1886.]

Opinion of the Court—Deady, J.

proved, which was done; but the agent continued the person in such employment and paid him therefor, and on settlement of his accounts at the treasury, fifteen hundred dollars thereof was disallowed: *Held*, That the payments being not only without authority, but contrary thereto, were illegal, and the agent and his sureties are liable therefor.

Before DEADY, District Judge.

Mr. James F. Watson, for the plaintiff.

Mr. William B. Gilbert, for the defendant.

DEADY, J. This action is brought on the bond dated March 5, 1872, of the defendant, Patrick B. Sinnott, as Indian agent, at the Grand Ronde reservation, and of the defendants, Luzerne Besser and E. Cahalin, as sureties therein, to recover a balance of three thousand and forty-eight dollars and eighteen cents, alleged and ascertained to be due the plaintiff thereon, at the United States treasury, March 21, 1885, on account of money and property received by said Sinnott under said bond and not duly accounted for, with interest from said date at the rate of six per centum per annum and costs and disbursements.

The answer of the defendants consists of a denial of the failure of Sinnott to account and the correctness and justice of the settlement at the treasury.

The case was heard by the court without the intervention of a jury.

The sum sought to be recovered consists of these items, namely: 1, eleven hundred and seventy-nine dollars, the proceeds of the sale of certain lumber made at the Indian sawmill; 2, three hundred and seventy-five dollars, the amount of a second payment by the superintendent to the agent on his salary account, for the second quarter of the year 1873; 3, fifteen hundred dollars paid to C. D. Folger, between July 1, 1874, and August 25, 1876, as "superintendent of farms and mills," less a credit of five dollars and eighty-two cents for an unexpended balance deposited to the credit of the United States.

The mill at which this lumber was sawed was erected by the United States for the Indians of this reservation in pursuance of the treaty with the Umpquas of November 29,

Opinion of the Court—Deady, J.

[January,

1854 (10 Stat., 1125), and that with the Molallas of December 21, 1885 (12 Stat., 981), and in fact belongs to them. And therefore, in my judgment, such lumber was not the "property" of the United States, within the purview of section 3618 of the revised statutes, which requires the proceeds of any sale thereof to be covered into the treasury; nor was the money received therefor, received "for the use of the United States," within the purview of section 3617 of the revised statutes.

As the agent and guardian of the Indians, it was the duty of the defendant Sinnott, subject to the instructions of the commissioner of Indian affairs, to dispose of the lumber made at this mill, and not needed by the Indians for their own use, and to use or apply any money or other property received therefor for their benefit.

This lumber was the product of Indian labor combined with the labor and skill of white men, that the United States bound itself to furnish them, in consideration of the cession of their lands. It was not then, properly speaking, the property of the United States; and certainly not within the contemplation of the sections of the revised statutes, 3617-18. In this case it appears from the treasury statement and the defendant's accounts, that in 1873 he received one thousand and seventy-nine dollars and thirty-one cents from the sale of lumber, of which he deposited to the credit of the United States, or in some way converted into its treasury one hundred dollars and thirty-one cents, and used the remainder in payment of current expenses of the agency, including the wages of the sawyer and loggers—first charging himself with the amount received. At the time he had no instructions to make any other or special disposition of these funds, and did not receive any until October, 1876, when he was instructed to deposit the same to the credit of the United States.

In the second quarter of 1874 the defendant furnished two hundred dollars worth of this Indian lumber for the building of the manual labor school on the reservation, and paid for it out of the funds furnished and designated for that purpose. The money received for this lumber he then

1886.]

Opinion of the Court—Deady, J.

applied to the payment of current expenses—first charging himself with the amount, as in the case of the funds so received in 1873.

It is objected that this transaction was contrary to section 3679 of the revised statutes, prohibiting expenditures in any department of the government in excess of appropriations. But certainly, this section has no application in the premises. There is no question but that the money expended for the lumber for the labor school was appropriated for that purpose. And the agent had as much right to use it in the purchase of material from the Indians as any one. So that the item of two hundred dollars is in the same category as the one of nine hundred and seventy-nine dollars, and the question concerning both is—was the money disbursed or accounted for according to law?

As I have said, in the absence of any instruction to the contrary, in my judgment it was; and the defendant Sinnott should be credited with the amount.

And even if the disposition of the money received from the sale of the lumber, was a technical violation of section 3617 or 3618 of the revised statutes, there is no pretense but that the defendant acted in good faith and the Indians to whom the money really belonged had the benefit of it. And therefore upon any equitable view of the transaction, he is entitled to be credited with the amount. (*United States v. Roberts*, 10 Fed. Rep. 540; *United States v. Stowe*, 19 Fed. Rep. 807.)

The item of three hundred and seventy-five dollars, for double payment of salary, is manifestly a mistake of the superintendent's. It is admitted that the superintendent, Odeneal, who was subpoenaed as a witness, but is unable to attend, would testify if sworn that he did not pay the salary twice. Sinnott swears positively that he never received the money but once, and there is nothing in the treasury statement to the contrary.

It appears from that that the superintendent paid the agent his salary for the second quarter of 1873, and took a voucher therefore in triplicate, and for some reason or by mistake sent two parts of such triplicate voucher, instead of one with his accounts to the department.

Opinion of the Court—Deady, J.

[January,

Upon this the accounting officers have assumed without, as it appears to me, any sufficient reason, that these two parts of one voucher relate to two different and distinct payments of the same amount for the same quarter's salary. Upon a parity of reasoning, if the superintendent had for any cause sent the three parts of this voucher to the department, the defendant would have been charged with receiving this salary thrice.

It is but fair to add that there is a slight difference in the language of these two papers, in the statement of the account—the one being for “salary” as Indian agent, etc., the other for “services rendered the Indian department,” as Indian agent, etc. But there is no difference in the language of the receipt by Sinnott or the certificate of payment by the superintendent, and manifestly they are parts of one transaction and relate to but one payment.

It would be absurd, as well as unjust, to charge Sinnott with the wrongful receipt of three hundred and seventy-five dollars on any such state of facts as this. And if the accounting officers have erroneously credited the superintendent's account, with this amount, as having been actually paid out by him, the agent is not responsible for the mistake.

And furthermore, if this salary had been paid to the agent twice, he would not be liable therefor on his bond. The security for the proper disbursement of this money is the bond of the superintendent—the officer who received it for that purpose. The agent's bond covers all moneys that come “into his hands,” as agent for the Indians, but not that which was paid to him, rightfully or wrongfully, as a compensation for his services.

He would be liable, of course, as an individual, for money had and received by him, by mistake or otherwise, that belongs to the United States, but not on his bond as agent; nor would his securities be liable therefor at all.

On July 2, 1874, Sinnott wrote to the commissioner of Indian affairs a statement of the employes engaged on the reservation. Among these was C. D. Folger, “superintendent of farms and mills,” at a salary of one thousand dollars per annum—a place which seems to have been created for his benefit.

1886.]

Opinion of the Court—Deady, J.

On the 7th of the same month he wrote to the commissioner that he "was induced" to employ Folger "by some political friends" of his, but that in his "judgment a superintendent of mills is unnecessary;" and that he "had better disapprove of the engagement of the superintendent of mills." And as to a superintendent of farms, he left that with the commissioner, saying, in a sentence that appears to lack something: "I attended to the business of farmer since I came here myself, and now that the farm is to be discontinued after harvest."

On July 25th the commissioner wrote in reply, disapproving of "the appointment of C. D. Folger" as unnecessary, the miller being sufficient to run the mill and the agent to manage the farm.

But on September 5th the agent wrote again to the commissioner, urging the approval of Folger's employment; to which the commissioner replied on September 30th, refusing to approve the same. And on March 9, 1875, the commissioner wrote again to the agent, calling his attention to the fact that Folger's name appeared in his report of employes for the third and fourth quarters of 1874 "as superintendent of farms and mills," and after referring to the correspondence between them on the subject, closed by saying: "You are now informed that vouchers for services performed by Mr. Folger will not be considered by this office." There is no pretense that Folger performed any service about the mill or farm, but it is claimed that he was of some use, or might have been, in showing the Indians the corners or boundaries of the allotments of lands which had lately been surveyed and assigned to them in severalty. He also acted as clerk for the agent, and in that capacity received and opened his official correspondence.

But the agent was not authorized to employ him in any capacity without the approval of the commissioner, and certainly there was no excuse for his doing so after the employment was expressly disapproved by the latter.

His excuse is that he never received the letter of March 9th, and he surmises and suggests that Folger may have suppressed it for fear of losing his place. And at his

Opinion of the Court—Deady, J.

[January,

request a day was given him to produce Folger as a witness on this point. But the party, though living in the city, was not produced or examined. But the letter of September 30th was sufficient without anything further to make the employment plainly illegal.

It is true that some of the payments, apparently amounting in all to six hundred and fifty-five dollars, were, on what was thought equitable ground, allowed by the Indian bureau, after being rejected by the treasury auditor. For instance, the two hundred and fifty dollars paid for the third quarter of 1874, which was allowed on the supposition that it might have been paid before the letter of September 30th reached the agent.

But this act of grace, as to part of the disbursement, does not render any of it legal, and is no defense to a claim to recover the balance.

The money was not only disbursed without authority, but directly in the face of it; and what is more, with the admitted knowledge that the employment was merely to serve the interest of or oblige "some political friends," and not the public good.

The plaintiff is entitled to a judgment against the defendants for this sum, less the credit of five dollars and eighty-two cents, with interest, in all fifteen hundred and sixty-five dollars and fourteen cents, with costs and disbursements.

THE UNITED STATES v. PATRICK B. SINNOTT ET AL.

DEADY, J. This case was heard in conjunction with the foregoing one. The action is brought on the bond, dated September 28, 1876, of the defendant, Patrick B. Sinnott, as Indian agent at the Grand Ronde reservation, and of the defendants, Nicholas B. Sinnott, Daniel Handley and William W. Page, as sureties therein, to recover a balance of five hundred dollars alleged and ascertained to be due the plaintiff thereon, at the U. S. treasury, on April 24, 1882, on account of money received by said Patrick B. Sinnott, under said bond and not duly accounted for, with

1886.]

Opinion of the Court—Hoffman, J.

interest from said date, at the rate of six per centum per annum, and costs and disbursements.

The answer of the defendants consists of a denial of the allegations of the complaint, showing a breach of the condition of the bond.

The sum sought to be recovered consists of two payments to C. D. Folger, as superintendent of farms and mills for the first and second quarters of the year 1876.

The money was paid contrary to the instructions of the commissioner of Indian affairs, and was therefore illegally disbursed.

There must be judgment for the plaintiff for the sum demanded, with interest from the date of settlement, amounting in all to five hundred and eighty-one dollars and twenty-five cents, with costs and disbursements.

THE ZEALANDIA.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

JANUARY 13, 1886.

1. CARRIER DAMAGE TO CARGO.—Libel dismissed on satisfactory proof that it could not have been caused by the fault of the carriers.

Before HOFFMAN, District Judge.

Mr. J. D. Redding, for libellants.

Mr. Milton Andros, for claimants.

HOFFMAN, J. The proofs show, I think, to a demonstration, that the very great damage sustained by the hides in question in this suit could not have been caused by the negligence of the carriers.

If any confidence can be placed in human testimony we must believe that the ship was staunch and dry, and that no water found access to the hides by the leakage of the vessel. This is shown not only by the testimony of the master and all his principal officers, but by the evidence of the very capable and reliable surveyors, who examined the after hold with the special object of ascertaining whether any signs of leakage could be discovered.

Points decided.

[January,

It also appears that the vessel had conveyed several shipments of hides from Sydney to this port, stowed in the same place and same manner as the hides in question, without damage.

She has also made two voyages since delivering the hides, with cargo in the after hold, which was delivered in good order, the vessel in the meantime having undergone no repairs whatever.

It is impossible, I think, to attentively peruse this testimony without coming to the conclusion that this extraordinary and unprecedented condition of the hides when delivered—whatever may have been the cause—cannot be attributed to the fault of the carrier.

The damage to the skins was caused by this breaking adrift of a cask of oil in the between decks. The testimony shows that the ship encountered weather of extreme violence; that the cask was securely lashed, and broke away during a tempest—an accident, it is said, of not unfrequent occurrence.

I should have thought that an accident of this character might be prevented by the exercise of proper care on the part of the carrier; but on the proofs I feel obliged to decide that in this case it must be attributed to perils of the sea.

Libel dismissed.

THE UNITED STATES v. S. A. HIELNER AND S. OTTENHEIMER.

CIRCUIT COURT, DISTRICT OF OREGON.

JANUARY 15, 1886.

1. MEASURE OF DAMAGES IN ACTION FOR THE CONVERSION OF TIMBER.—An innocent purchaser, from a willful trespasser, of timber cut on the public land is liable for the value of the timber at the date of such purchase, including the increased value which said trespasser had bestowed upon it.
2. CASE IN JUDGMENT.—H. purchased 50,000 feet of lumber at the mill of E., made from timber willfully cut from the public land by the latter without the knowledge of H., and hauled the same to Baker City, a distance of twenty miles, at a cost of \$5 per thousand, where he disposed of it

1886.]

Opinion of the Court—Deady, J.

at \$15 per thousand; *Held*, that in an action by the United States to recover damages for the conversion of said timber, the true measure thereof was the value of the lumber at the mill.

3. NEW TRIAL—INTEREST ON VALUE OF PROPERTY CONVERTED.—On the trial it was taken for granted that the lumber was delivered to the defendant at Baker City, and the jury took its value there as the measure of damages; but on a motion for a new trial, it being admitted that the defendant paid for hauling the lumber to that place, and no objection being made to the omission to prove that fact on the trial, a new trial was granted the defendant, unless the plaintiff would remit the cost of hauling, \$250, less \$120, the amount of three years' interest on the value of the lumber at the mill, which the plaintiff had omitted to claim on the trial.

Before DEADY, District Judge.

MOTION FOR A NEW TRIAL.

Mr. James F. Watson, for the plaintiff.

Mr. Lewis L. McArthur, for the defendants.

DEADY, J. This action was brought January 2, 1884, to recover damages from the defendants for the wrongful taking and cutting into boards of four hundred thousand feet of logs, belonging to the plaintiff, and wrongfully converting the same to their own use.

It is alleged in the complaint that between June 1, 1881, and the commencement of this action, one O. T. Elliott wrongfully cut and made into saw logs, on section 17, in township 7 south, of range 38 east of the Wallamet meridian, as subsequently surveyed, four hundred thousand feet of timber, and removed the same, to a steam saw mill in Baker county, Oregon, with intent to dispose of the same; that the defendants, well-knowing the premises, took possession of said saw logs, then and there being of the value of twelve hundred dollars, and wrongfully cut the same on said mill into boards, of the value of four thousand eight hundred dollars, and did then and there convert the same to their own use, to the damage of the plaintiff four thousand eight hundred dollars.

On June 2, 1884, the defendants answered separately, denying, substantially, any knowledge of the allegations of the complaint relative to Elliott's cutting and removing tim-

ber from the public land; and admitting that on and since October 1, 1882, they each had an interest in the steam saw-mill situate on or near the section aforesaid, but that about said date it was removed to land belonging to the defendants; and denying that they were in any way interested in the running of said mill between the time of acquiring said interests therein and its removal, or that they ever took possession of said logs or sawed that same into lumber, or converted the same to their use.

On the trial it appeared that in April, 1882, the defendant Heilner took a conveyance of the mill in question, it being then located on the unsurveyed public land and on or near this section 17, and the same day leased it to said Elliott for so much lumber—the transaction being, in fact, a mere security for the delivery to Heilner of lumber in payment of money theretofore advanced by him to Elliott; that in the summer of 1882 there was received under said arrangement, by Heilner at Baker City, from forty to sixty thousand feet of lumber, made from logs cut and taken from said section 17 by said Elliott, which was worth at the mill about ten dollars per thousand, and at Baker City, a distance of twenty miles therefrom, fifteen dollars per thousand; and that, although the defendants were then members of a mercantile firm at Baker City, the defendant Ottenheimer had no interest in the transaction.

The jury found for the defendant Ottenheimer and against the defendant Heilner, and assessed the plaintiff's damages by reason of the premises at seven hundred and fifty dollars.

Afterwards, counsel for Heilner made a motion for new trial, on the ground that the lumber was delivered by Elliott and received by the defendant at the mill, and the latter paid the cost of hauling the same to Baker City, which was five dollars per thousand.

This fact did not appear on the trial, but the case was given to the jury on the supposition, that Elliott delivered the lumber at Baker City. On this hypothesis, the jury, taking the mean of the evidence—fifty thousand feet—as the amount of lumber received by Heilner, and its value at Baker City—fifteen dollars per thousand—properly as-

1886.]

Opinion of the Court—Deady, J.

sessed the plaintiff's damages at seven hundred and fifty dollars.

But the district attorney now concedes that the defendant did receive the lumber at the mill and paid for hauling it to Baker City, where presumably it was disposed of by him and finally converted to his own use.

But he also contends that Elliott, being a willful trespasser, the defendant is not only liable for the value of the timber at the mill including the value of the labor put upon it by Elliott, but for the full value of the property at any time after it came into his possession and before this suit was brought for the conversion, which includes, of course, the cost of transportation from the mill to Baker City.

The rule for ascertaining the damages in such cases has been a vexed question—the volume, if not the weight of authority, being that the value of the property at the time of conversion or appropriation to the use of the defendant, with interest thereon, constitutes the measure of damages. (Field on Dam., section 792.)

But this includes any accession of value between the taking and conversion.

Blackstone (2 Book, 404) says that the rule of the Roman law had been copied and adopted by Bracton and confirmed by the courts of England, that if any property receives “an accession by natural or artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement; but if the thing itself, by such operation, was changed into a different species, as by making wine, oil or bread out of another's grapes, olives or wheat, it belonged to the new operator, who was only to make satisfaction to the former proprietor for the materials which he had so converted.”

And in *Silsbury v. McCoon*, 3 N. Y., 379, the court went further and held that when the taking was willfully wrong it matters not that the species has been changed, the wrongdoer acquires no property in the article produced, so long

as it can be shown that it was made from the material converted—as when corn is made into whisky.

But the rule laid down in *Wooden Ware Company v. U. S.*, 106 U. S. 432, is of final authority in this court.

In that case it was held that in an action to recover damages for timber cut and carried away from the public land, the defendant, if a willful trespasser, is liable for the full value of the property at the time of commencing the suit, without any deduction for any labor or expense bestowed thereon; but if he is an unintentional or mistaken trespasser, he is only liable for the value of the timber at the time of conversion, less the value of any such labor or expense; and that a purchaser from a willful trespasser without notice of the wrong or the true ownership of the property, is only liable for the value thereof at the time of such purchase, and not for any labor or expense he may bestow upon it thereafter.

It is admitted that the defendant purchased this lumber from a willful trespasser, and is therefore liable to the United States at least for the full value of the same at the time of such purchase. He bought and received the lumber at the mill, where it was worth ten dollars per thousand. If he purchased without notice that the property belonged to the United States, he is not liable for any additional value he may have put on it, before the suit was brought, by hauling it to Baker City; but if he had such notice he is so liable.

As to the knowledge of the defendant, there is no direct evidence, and the circumstances do not warrant any satisfactory inference on the subject.

The objection that this point ought to have been made on the trial was not made by the district attorney, and may be considered waived. Probably he thought the defendant entitled to favorable consideration in this respect, for the candid and truthful manner in which he testified when called as a witness by the United States to make out a case against himself—which is a matter of rather rare occurrence in cases of this kind, so far as my observation goes.

Assuming then, that the defendant was not liable for the value of the lumber at Baker City, but only at the mill, the

1886.]

Points decided.

verdict should not have been for more than five hundred dollars.

But while revising this verdict, there is another circumstance that ought to be considered. The United States was entitled to interest on the value of this lumber from the time of the conversion—in the summer or fall of 1882, until the finding of the verdict—November 27, 1885. No claim for interest was made on the trial or the court would have instructed the jury to allow the same.

But, under the circumstances, I think it nothing more than right, to provide that the interest which the plaintiff was entitled to recover, be deducted from the two hundred and fifty dollars, and the verdict considered as excessive only for the remainder.

Three years' interest at eight per centum per annum on five hundred dollars is one hundred and twenty dollars, which being deducted from two hundred and fifty dollars leaves a remainder of one hundred and thirty dollars.

The order of the court will be, that the verdict be set aside and the cause retried, unless the plaintiff, within ten days hereof, enters a remittitur for the amount of one hundred and thirty dollars.

UNITED STATES v. CURTNER.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JANUARY 18, 1886.

1. **RIGHT OF UNITED STATES TO VACATE PATENT TO LAND.**—Where the United States is under an obligation to make a title to a portion of the public lands, they have such an interest in the lands as entitles them to maintain a suit in equity to vacate a prior patent improperly issued by mistake to a party not entitled to it.
2. **PARTIES TO SUIT.**—Where lands have been improperly listed by the officers of the United States land department by mistake to the state of California, and the state has subsequently patented them to private parties, the state is not an indispensable party to a suit by the United States against the several patentees to annul such patents. Nor is the party entitled to the lands by right fully vested prior to such listing to the state an indispensable party.

Opinion of the Court—Sawyer, C. J.

[January,

3. **SAME—MULTIFARIOUSNESS.**—A bill in equity filed by the United States under circumstances set out in the bill, to vacate the patents to several parties of several distinct parcels of land, the several defendants having no joint interest in any portion of the land, depending upon the same facts and the same evidence, is not objectionable as being multifarious.

Before SAWYER, Circuit Judge.

Mr. S. G. Hilborn, United States attorney, and Messrs. Shafter, Parker & Waterman, for the complainant.

Mr. L. D. Latimer, for the defendants.

SAWYER, Circuit Judge, orally. This is a bill filed by the United States to set aside listings of certain lands to the state of California, and certain patents therefor, issued to defendants by the state.

The ground is, that the lands, listed and patented, are odd sections within the limits of the grant made by the United States to the Central Pacific Railroad Company; that no other right had attached to them, at the time of filing the definite location of the road; that the road having been completed pursuant to the act of congress, the title vested; and that the lands were listed over to the state by mistake, the right of the railroad company to a patent having before the listing fully vested and become perfect.

The state, after such listing over, patented them to the several defendants or their grantors in this case. This suit is brought by the United States, under direction of the attorney general, to annul the listing and these patents, on the ground, that they were issued by mistake, when there was no right, except the bare, naked, legal title left in the United States, and no authority in the officers of the United States to list them over to the state of California.

There is a demurrer to the bill.

In the first point, counsel follow the suggestions in the case of *United States v. Minor*, 114 U. S. 233, as to whether the right to the lands having already passed out of the United States, the complainants have any interest in the suit. They suggest the points, therein indicated, and rely upon them.

1886.]

Opinion of the Court—Sawyer, C. J.

I think the United States have such an interest in the lands, or that they stand in such relation to them, as entitles them to maintain a suit.

Under the allegations of the bill, the right to a patent to the lands was fully vested and perfected in the railroad company before the listing to the state. The officers of the government, therefore, acted wholly without authority in listing them to the state; but they did list them over, and the state has patented them, to the several defendants, and their grantors, and thereby a conflict has arisen, and the government recognizes the right of the railroad company. There has been a conflict for years over these lands, the railroad company seeking a patent. The government, after a due consideration of the subject, recognizes the fact that these lands belong to the railroad company, but declines to complicate the matter by issuing another patent. It prefers to vacate the title issued, in order that it may give a perfect title, which I think is a very proper mode of procedure on the part of the United States. It is much better than issuing another and second patent, thereby complicating the title and leaving the railroad company a long litigation with each individual defendant on its hands. It was through the wrongful acts of the officers of the government that this conflict arose, and the listing to the state stands in the way of issuing the patent to the proper party. As the wrong resulted from the mistake of the government officials, the government of the United States is under obligation to perfect the title for its first grantee. The United States have an interest, therefore, in the litigation, because they are morally and legally bound—although there may be no remedy in the courts against the government—to see that this title is made perfect, and they, therefore, stand in such relation to the lands in this case as gives them a right to intervene to set aside the listing to the state, and the patents issued in pursuance of such listing in order that they may perform their duty, and discharge their legal and moral obligation to the railroad company.

The following authorities, I think, sustain that position: *United States v. Hughes*, 11 How. 568; *Hughes v. United*

Opinion of the Court—Sawyer, C. J.

[January,

States, 4 Wall. 235; *United States v. Stone*, 2 Id. 535; *United States v. Robbins*, 96 U. S. 533.

The United States is an injured party, it being placed in that position where it cannot fulfill its legal obligation. I think that objection, therefore, should be overruled.

The second objection, is, that there is a defect of parties plaintiff—the railroad company not having been made a party.

The railroad company, although it is interested in the land, is not a party to the transaction between the United States and the state of California, and it derived no title from the United States, subsequently, to this transaction. The right of the railroad company was vested, and perfected, before this transaction. It is not a subsequent claimant. It being no party to the transaction, and not claiming by title subsequent, I think it is not an indispensable, or necessary party to the suit. The sole duty to make a title is on the government. Whether it would be a proper party, it is not necessary now to determine. I think that objection should be overruled.

The next objection, is, that the state of California should be a party. The state of California has parted with all her interest in the lands, whatever it was, to the defendants in this case, and she now has no interest in them, to be affected. I do not think she is an indispensable, or a necessary party, to this suit. Besides, the state of California cannot be sued. She is not subject to be sued, and could not be made a party. As to whether she would be a proper party, it is not necessary to determine; but I do not think the state of California is an indispensable party, as to any suit between the United States and her grantees. The United States have no interest in any litigation between the state and her grantees, arising out of the transactions between themselves. The demurrer is, therefore, overruled on that point.

It is claimed that the bill is multifarious, in that each of the parties defendant has a separate patent from the state.

These lands were listed to the state under one act. It is possible that they were listed at different times, but it was all done under one act, and the rights of the railroad com-

1886.]

Opinion of the Court—Sawyer, C. J.

pany, the moving cause of this suit are derived from the United States under one act. There are, therefore, two points of title common to all the parties. The same questions arise as to all of these defendants, and the case of each will be decided on the same issues, and the same testimony.

There is no difficulty, then, in litigating all the questions, and the rights of all the parties, in the same suit.

In this matter of multifariousness, in equity practice, there is no definite, absolute, unbending rule. It rests very much in the discretion of the court. The litigation in this suit will prevent a multiplicity of suits. A suit brought against each defendant, respectively, would be oppressive to the government, and to all parties, and be much more expensive to both.

I think the bill is unobjectionable in that particular.

The statute of limitations, and that the claim is stale, are set up as grounds of demurrer, but they do not appear to be relied upon in the argument. Indeed, nothing is said on these points. The statute of limitations, if applicable as such in equity cases in the national courts, does not apply to the United States.

As to staleness, the railroad company has, constantly, been pressing its claim before the proper officers, and awaiting for years, on the routine of the land department of the government. The department has been considering it, and the claim having gone through all stages, the secretary of the interior has, finally, decided that the company was entitled to the lands, and directed the commencement of this suit. The proceedings have been as expeditious as is usual in such cases, and as the nature of the case admits.

I do not think the charge of stalement will lie in this matter. The case, I think, is within the rule on this point stated in *United States v. Minor*, already cited.

The demurrer will, therefore, be overruled, and the defendants allowed till the rule day in March to answer.

THE BARK D. C. MURRAY.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

JANUARY 18, 1886.

1. DAMAGES ALLOWED PASSENGERS FOR BAD QUALITY OF FOOD.

Before HOFFMAN, District Judge.

Mr. Chas. Page, for libellants.*Mr. C. K. Bonestell*, for claimants.

HOFFMAN, J. I have found it impossible to arrive at any certain conclusion as to the details of the grievances complained of by the passengers.

The testimony is conflicting, not only as to the general quality of the food and water furnished to the passengers, but also on points as to which it is difficult to believe that an honest mistake has occurred. A notable instance of this is found in the conflicting statements of Mrs. Harrington and her daughters, and those of Mrs. Hesketh.

The former testify that the food was excellent, and that they never complained of it.

Mrs. Hesketh, who is a lady of some seventy years, says that the elder Miss Harrington used to complain to her that the food was very bad, except the clam soup.

Mrs. Hesketh also testifies that Mrs. Berry (the captain's wife) frequently said she should die if she could not get better food, and spoke of growing thin in consequence of its bad quality.

Mrs. Berry denies this emphatically, and maintains that the provisions were of excellent quality.

If her statement be accepted as accurate the passengers had no ground whatever for complaint.

And yet that complaints were made constantly throughout the entire voyage, it appears from the testimony of Captain Berry himself.

One fact is clear. All the cabin passengers left the vessel at Honolulu; some of them even taking steerage passages in the steamer from that port.

1886.]

Opinion of the Court—Hoffman, J.

Their disgust with the ship does not seem to have been wholly caused by the bad quality of the water and provisions. A most unpleasant feeling appears to have grown up between the master and his wife, and all the passengers except Mrs. Hesketh. Evidence of that feeling is abundant in the testimony.

The master seems to have been of a taciturn and morose disposition, was frequently guilty of rudeness, and occasionally indulged in threats and profanity. How far his conduct may be excused on the ground of exasperation at the incessant and open expressions by the passengers of dissatisfaction and a disgust with their food, depends upon how far those expressions were justified by its quality. I am inclined to think that the beef and pork were, for the most part, bad, the water dirty and brackish, but for how much of the time I have been unable to ascertain with certainty.

That the rice had weavels in it occasionally cannot be doubted; but how often it is difficult to discover. Other articles of food, such as tripe, canned meats, the bread, oatmeal, etc., etc., are condemned by the passengers in unmeasured terms. They are declared by the claimant's witnesses to have been very good. Both statements are probably exaggerated. It would be endless to examine the testimony in detail with respect to every article of food supplied to the passengers. The provisions which the steerage passengers called by the claimants pronounce "excellent" and "splendid," are in many instances spoken of by the cabin passengers as putrid, rotten and offensive.

In some cases the complaints of the latter seem frivolous or unfounded; as, for example, the importance they seem desirous of attaching to the circumstance that a pig which had been slaughtered became tainted before it could be used, the vessel being at the time in the tropics; or Mrs. Hesketh's condemnation of the tea as "bad," because it was "too strong," and she had to dilute it with water before she could use it.

But on the whole, I am of opinion that the food to the passengers was in general of a very inferior quality and

Points decided.

[January,

by no means such as they were entitled to expect, when it is considered that they paid for their passage one hundred and twenty-five dollars each, when the fare for a first-class passage by steamer from this port to Sydney is only two hundred dollars.

If in reaching this conclusion I err by giving too much credence to the statements, possibly exaggerated, of the libellants, the claimants have themselves chiefly to blame. It would have been easy on the vessel's arrival to have called a survey upon her remaining stores. Her precise condition and quality of the beef, ham, pork, flour, rice, oatmeal, etc., could have been unmistakably ascertained.

I shall decree to Mr. Haley three hundred dollars for himself and family; the sum of one hundred dollars to each of the other libellants.

B. G. CRANE v. PETER RUNEY.

CIRCUIT COURT, DISTRICT OF OREGON.

JANUARY 18, 1886.

1. **MONEY RECEIVED ON ERRONEOUS JUDGMENT.**—Where money is received on an erroneous judgment by a party thereto, the law, on a reversal of the same, raises an obligation against such party, to restore the amount, which obligation may be enforced by an action, as for money had and received to the use of the plaintiff therein.
2. **CASE IN JUDGMENT.**—In a suit to enforce a mechanics' lien, the parties hereto with others having liens on the same property were made defendants, and the court by its decree directing the sale of the property and the distribution of the proceeds among the parties, postponed the payment of the plaintiff's claim to that of the defendant's, which portion of the decree, the supreme court, on appeal taken after the confirmation of the sale and the distribution of the proceeds, reversed, and also ordered a resale; *Held*, that on the reversal of the erroneous decree, the defendant in contemplation of the law held the money wrongly received by him thereon for the use and benefit of the plaintiff, to whom it should have been originally adjudged and paid, and that he might maintain an action to recover the same as for money had and received to his use; and the order of resale did not limit or affect his right in this particular.

Before DEADY, District Judge.

1886.]

Opinion of the Court—Deady, J.

Mr. Claude Thayer, for the plaintiff.

Mr. Raleigh Stott, for the defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of California, to recover from the defendant, a citizen of Oregon, the sum of twelve hundred and sixteen dollars and twenty-five cents, had and received by the defendant to the use of the plaintiff.

The defendant demurs to the complaint, for that it does not state facts sufficient to constitute a cause of action.

It is alleged in the complaint that on March 19, 1878, the defendant received from the county clerk of Clatsop county to and for the use and benefit of the plaintiff said sum of money, which of right should have been paid to him; that such clerk received said money as the clerk of the circuit court for said county from the sheriff thereof, as a part of the proceeds of the sale of certain real property theretofore sold by him, to G. W. Parker, on a decree of said court, in a suit wherein J. C. Trullinger was plaintiff and N. Kofoed, Mary Kofoed, G. W. Parker and the parties hereto were defendants; that the money paid to defendant as aforesaid was so paid in accordance with an erroneous provision in said decree, which on appeal to the supreme court of Oregon, was thereafter, on August 25, 1879, so modified that the plaintiff was thereby adjudged to be entitled to the said twelve hundred and sixteen dollars and twenty-five cents, but the defendant still retains the same and refuses to pay it over to the plaintiff, although often requested so to do.

The law is well settled that on the reversal of a judgment an obligation arises on the part of the party to the record who has received the benefit of the erroneous judgment, to make restitution to the other party of or for what he has thereby lost. The reversal of the judgment gives a right of action as between the parties thereto and creates an obligation against the one who has had the benefit of the same to restore to the other what he has thereby lost.

At one time it was the practice to obtain this restitution, either by a writ of restitution when the record showed what had been lost or what money had been paid, and in other

cases by a *scire facias quare restitutionem non*, issued out of the court where the judgment was given.

But with the growth of the action for money had and received, these proceedings fell into disuse, and the obligation to restore has long since been enforced by action. And under the code there is no other remedy that I am aware of. (*Bank of U. S. v. Bank of Washington*, 6 Pet. 17, 19; *Clark v. Pinney*, 6 Cow. 299. And see *Yates v. Joyce*, 11 John. 140; *Hoxter v. Poppleton*, 9 Or. 482; *Rap & Law Dic., Restitution* 1; *Scire facias* 10.)

Upon the facts stated in the complaint, this seems to be a clear case for recovery. There appears to have been a decree of the circuit court for Clatsop county, ascertaining and determining the rights of the parties in the suit mentioned therein, in a fund then in court or to be there, arising from the sale or disposition of certain property in pursuance of the order of the court, which decree erroneously gave the sum now sued for to the defendant herein instead of the plaintiff, and for that reason was reversed on an appeal to the supreme court.

By this erroneous decree the plaintiff lost the twelve hundred and sixteen dollars and twenty-five cents that the defendant obtained, but as soon as it was reversed the law created an obligation against the latter to return what it then appeared did not belong to him, but to the plaintiff, for whose use and benefit the defendant is thereafter deemed to have received it.

On the argument, however, counsel for the defendant undertook to put a new face on the facts by citing and reading the opinions of the supreme court in the case of *Trullinger v. Kofoed et al.*, 7 Or. 228; 8 Or. 436.

But while a reference to these opinions may give the court a knowledge of some matters connected with said case not contained in the complaint, they cannot be allowed to vary the legal effect of the facts stated therein.

The case before the court is confined to the facts stated in the complaint.

But really there is nothing in the reports of *Trullinger v. Kofoed et al.*, contrary to the case stated in the complaint.

1886.]

Opinion of the Court—Deady, J.

From the report in 7 Oregon it appears that a suit was brought by Trullinger to enforce a mechanic's lien against certain property of N. Kofoed and Mary, his wife, in which suit G. W. Parker and B. G. Crane, mortgagees of the same property, were made defendants, and also Peter Runey, who claimed a lien thereon by virtue of a mechanic's lien and a mortgage for the same debt—the former being prior in time to Crane's mortgage and the latter subsequent thereto.

And thereupon a controversy arose between the plaintiff and defendant herein, as to which of them had the prior lien.

The court below decided the question in favor of Runey and directed the proceeds of the sale of the property, which amounted to four thousand two hundred and eighteen dollars and twenty cents, to be distributed accordingly, which was done. But on an appeal to the supreme court it was decided that Runey, by taking a note and mortgage for his debt, waived his mechanic's lien, and the decree in this respect was reversed and directions given for a decree postponing the payment of Runey's claim to that of Crane's.

From the report of the case in 8 Oregon, it appears that the appeal was not taken by Crane until after the order confirming the sale was made, and that it was then taken, both from the decree determining the rights and priorities of the parties as well as such order; and that on the hearing the court remanded the case with the further direction that a resale be made.

The court below made the order for resale in pursuance of the mandate, but it does not appear that any such sale has been made; and counsel for the defendant insists that the plaintiff's remedy is by means of this resale.

But unless the property will sell for more than it did before—and it is not likely that it will—a resale will be of no benefit to any one, and a useless expense to whoever undertakes it. And the plaintiff is under no obligation to resort to it if it would.

The property brought enough to pay his claim, or so much of it at the first sale. But this amount—twelve hundred and sixteen dollars and twenty-five cents—instead of

Points decided.

[January,

being paid to him, was, in pursuance of the erroneous decree, paid to the defendant, who is, by the reversal of such decree, bound to restore the same to the plaintiff, without any reference to the order of resale, with interest from the date of such reversal.

The order of resale was presumably made for the benefit of the defendant, whose claim is now postponed to all the others. By this means he may save himself by bidding, at such resale, a sum sufficient to cover his claim. At the first sale there was no inducement for him to do so, as the sum bid covered his claim where it then stood. And probably the owner of the property has a right to have this resale made with a view of further satisfying the demands against him on account of it.

But so far as the sum in controversy in this case is concerned, the plaintiff has no interest in the question. In contemplation of law he has already received this amount and cannot get it again, either from the property or its owner. He must look to the defendant, who received it in fact, but, as it turns out, only for his use.

The demurrer is overruled.

YICK WO v. PATRICK CROWLEY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JANUARY 20, 1886.

1. JURISDICTION TO ENJOIN PROCEEDINGS IN STATE COURT. — The United States circuit court has no authority to restrain the chief of police of San Francisco from serving warrants of arrest issued by the police court upon criminal charges for violating city ordinances, alleged to have been passed in contravention of the fourteenth amendment of the constitution of the United States, and of the stipulations of our treaty with China.
2. SECTION 720 OF THE REVISED STATUTES prohibits the issue of injunctions to restrain proceedings in the state courts.

Before SAWYER, Circuit Judge.

Mr. Hall McAllister, Mr. D. L. Smoot and Mr. L. H. Van Schaick, for the complainant.

Mr. Alfred Clarke, for the respondent.

1886.]

Opinion of the Court—Sawyer, C. J.

SAWYER, Circuit Judge, orally. In the bill, the complainant alleges that Patrick Crowley, respondent, is chief of police of the city and county of San Francisco, and that he has certain warrants, by virtue of which he is about to arrest complainant, a citizen of China, and a large number of other Chinese subjects, upon the charge of violating certain ordinances, adopted by the board of supervisors of said city and county, which he alleges to have been passed in violation of the fourteenth amendment to the national constitution, and of the stipulations of the treaty between the United States and the empire of China. Complainant sues on behalf of himself, and one hundred and fifty others, and prays, "that the said Patrick Crowley, chief of police, as aforesaid, may be enjoined and restrained from enforcing, by arrest or otherwise, the aforesaid ordinances, to wit, section 1 of order 1559, section 1 of order 1569, and sections 67 and 68 of order 1587."

Section 720 of the revised statutes is as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This provision was carried into the revised statutes from the statute of March 2, 1793, expressly prohibiting any interference on the part of a national court with proceedings in the courts of a state. That statute has been construed a great many times by the supreme court. As early as 1807, the case of *Diggs v. Wolcott*, 4 Cranch. 179, arose in which an action was brought in a state court upon a certain instrument in writing. The defendants afterwards brought suit in chancery in the state court to cancel the instrument and enjoin the proceedings in the case.

The chancery suit was removed to the United States circuit court, where a decree was entered enjoining the proceedings in the state court. On the appeal the court says: "The case was argued upon its merits by C. Lee and Swann for the appellants, and by P. B. Key for the appellee; but the court being of opinion that a circuit court of the United States had no jurisdiction to enjoin proceedings in a state court, reversed the decree."

Opinion of the Court—Sawyer, C. J.

[January,

That decision has since been followed in a great many cases, arising under a great variety of circumstances; as in *United States v. Collins*, 4 Blatchf. 156; *Fisk v. U. P. R. Co.*, 6 Id. 399; *Riggs v. Johnson County*, 6 Wall. 195; *Orton v. Smith*, 18 How. 265, 266; *Slaughter House Cases*, 10 Wall. 298; *Dial v. Reynolds*, 96 U. S. 340; *Peck v. Jenness*, 7 How. 625; *Huines v. Carpenter*, 91 U. S. 257, and many others in the circuit and supreme courts.

There are other cases, however, not necessary to notice here, limiting the provision and rule, to proceedings *first commenced* in the state court, and where a United States court has first obtained jurisdiction over the parties, and the subject-matter, holding, that it is entitled to proceed to the conclusion and execution of its judgment, unaffected by any subsequent proceedings in a state court of co-ordinate jurisdiction; and that, to enable it to give effect to its proceedings in such cases, may even enjoin adverse proceedings in a state court.

In the bill, this court is asked to restrain the execution of process issued by a state court and placed in the hands of the chief of police, whose duty it is to execute that process. The service of process is a *proceeding* in the court. But in *Riggs v. Johnson County*, *supra*, the court says: "State courts are exempt from all interference by the federal tribunals, but, they are destitute of all power to restrain either the process, or proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action, the *process* issued by the one, is as far out of the reach of the other as if the line of division between them was traced by landmarks and monuments visible to the eye."

In the case of the *United States v. Collins*, *supra*, it is held that *no process* of a state court, preliminary to the final determination of the case, can be stayed by injunction issued out of a United States court. The court says: "The fifth section of the act of March 2, 1793, prohibits the courts of the United States from granting an injunction to stay proceedings in any court of a state. This term 'proceedings'

1886.]

Opinion of the Court—Sawyer, C. J.

may, properly, and I think must, necessarily, include all steps taken by the court, or *by its officers under its process*, from the institution of the suit until the close of the final process of execution, which may issue therein."

The supreme court has, likewise held, that a national court not only cannot directly restrain a state court, but cannot restrain its proceedings even by an injunction issued against the parties to a suit in the state court. In *Peck v. Jenness*, 7 How. 625, the court says: "The fact, therefore, that an injunction issues *only to the parties* before the court, and *not to the court*, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

"The act of congress of the second of March, 1793, declares that a writ of injunction shall not be granted 'to stay proceedings in any court of a state.' In the case of *Diggs v. Wolcott*, 4 Cranch. 179, the decree of the circuit court had enjoined the defendant from proceedings in a suit pending in a state court, and this court reversed the decree, because it has no jurisdiction to enjoin proceedings in a state court."

As recently as the case of *Haines v. Carpenter*, 91 U. S. 257, the same doctrine was announced in the following language: "In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the circuit court. This is one of the things which the federal courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in section 720 of the revised statutes, and extends to all cases except where otherwise provided by the bankrupt law. This objection alone is sufficient ground for sustaining the demurrer to the bill."

In that case it was attempted to restrain the state court through an injunction against the parties; and the supreme court holds that this cannot be done. The same doctrine was repeated in *Dial v. Reynolds*, 96 U. S. 340.

Opinion of the Court—Hoffman, J.

[January,

The proceedings which are here sought to be restrained, are proceedings in a state court, in which warrants have been issued against the complainant, and many others, and placed in the hands of the executive officer of the court for service. It is sought to enjoin the service of process, which would be to stay the proceedings, and prevent the court from acting in the case. This is clearly within the prohibition of the statute, as, repeatedly, construed by the courts; and this court has no authority to restrain those proceedings. Within the last fifteen years a great many applications—under a great variety of circumstances—have been made to this court for preliminary injunctions to restrain proceedings in the state courts in civil cases, and they have, invariably, been denied.

This court has no authority to restrain proceedings *first commenced* in a state court, nor has a state court authority to restrain proceedings in this court. The court, therefore, has no jurisdiction to grant the relief sought in this bill.

Let the order to show cause be discharged, and the application for an injunction be denied.

The demurrer to the bill is also sustained for want of authority to grant the relief sought, and the bill dismissed.

THE BARK HUNTER.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

JANUARY 22, 1886.

1. SEAMEN NOT ALLOWED LAY ON BONE OBTAINED BY BARTER.—Charges by master for "slops" disallowed. The seamen denying that they were justified, and the master producing no account books or other evidence that they were supplied.

Before HOFFMAN, District Judge.

Mr. J. D. Sullivan, for libellant.

Mr. Wm. H. Cook, for claimants.

HOFFMAN, J. The proofs, I think, show that the libellant was engaged at a lay of the one one-hundredth (1 $\frac{1}{100}$) he so

1886.]

Opinion of the Court—Hoffman, J.

swears himself, and he is corroborated by the testimony of Mr. Russell, who was engineer on board the ship-wrecked vessel "Rainbow" from which they were received with others of the crew of the latter. At the time of his shipment in answer to the master's inquiry, he said that his lay on board the "Rainbow" was the one one-hundredth ($1 \frac{1}{100}$) lay, in fact it was the one one-hundred and twenty-fifth ($1 \frac{25}{100}$) lay, but the master believed his statement and agreed as he alleges to take him on the same lay.

It is admitted that shipwrecked seamen taken on board a ship in the Arctic ocean usually receive a higher lay than that allowed to crews shipped at the commencement of the voyage.

The master swears the lay was the one one-hundred and seventy ($1 \frac{17}{100}$) lay. He is wholly uncorroborated. The preponderance of proofs therefore, as well as the probabilities of the case, indicate that the lay was the one one-hundredth ($1 \frac{1}{100}$). All doubt, however, might have been removed if the master had put the man's name on the shipping articles, which he omitted to do, though, as the libellant says, he often requested it.

The "hail" of the master on his arrival stating the catch to be two hundred and eighty (280) barrels of oil is proved to be erroneous. The oil actually taken was three hundred and nine (309) barrels. The libellant is of course entitled to have his account settled upon the basis of the actual catch of the vessel.

As far as I can ascertain from the testimony, the crew are not entitled, unless specially stipulated for, to any lay in the "trade bone"—that is bone obtained from the natives by barter.

I am inclined to think that the libellant cannot claim any share in the oil and bone taken after he left the ship. He does not appear to me to have been discharged—that is expelled from the vessel against his will or protest. A disagreement occurred between him and the master, at which both seemed somewhat irritated. They seemed to have parted by mutual consent.

Under the special circumstances of this case the recovery

Opinion of the Court—Hoffman, J.

[January,

of the libellant must be limited to his lay in the oil and bone taken while he was aboard. Some of the oil probably taken from the dead whale seems to have been of an inferior quality. The bone was shipped to New York for sale, there being no market for it here. The freight and incidental expenses of conveying it to a market and selling it must be deducted from its proceeds or its value (if not sold).

A tabular statement is appended, drawn up in accordance with these views and showing the amount and value of the oil and bone on which the libellant is entitled to the one one-hundredth ($1 \frac{1}{100}$) lay.

I have added ten per cent. to the cost price so far as I can ascertain it, of slops furnished to the libellant. I have disallowed a charge against him of three dollars (\$3) for a pair of boots. The master swears they were furnished, but produces no books of account. The libellant denies that he received them. I am inclined to suspect that they were furnished to him, but the claim of the master is in the nature of an offset or counter-charge to the demand of the libellant. He is bound to establish it by a preponderance of proof; as between his assertion and the libellant's denial I must accept the latter.

If the master of a vessel proposes to charge the seamen with supplies of this nature, he should set each item down at the time it was furnished in an account book kept for the purpose; the entries in which he can verify by his oath.

The libellant is entitled to a decree for the sum of forty-eight dollars and twenty cents (\$48.20), together with costs.

SCHEDULE.

The amount of oil obtained from the two whales
taken whilst libellant was on board I find to
have been..... 5435 gals.

The amount of bone obtained from the whales
taken whilst libellant was on board I find to
have been..... 3090 lbs.

I allow as the value of the oil, for the
purpose of ascertaining libellant's
share of the catch, as follows:

1886.]

Opinion of the Court—Sawyer, C. J.

1800 gals. oil @ 18c. per gal.....	\$ 324 00
3635 gals. oil @ 25c. per gal.....	908 75
And for the value of the bone as follows:	
3090 lbs. bone @ 1.75 per lb.....	5407 50
<hr/>	
Total value of catch.....	\$6640 25
The 1-100 lay of which would be.....	\$66 40
I have allowed slops @ \$18.20.....	18 20
(Disallowing charge for boots.)	<hr/>
Due libellant.....	\$48 20

IN RE WO LEE ON HABEAS CORPUS.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JANUARY 26, 1886.

1. **STATE AND CIRCUIT COURTS.**—The supreme court of the state, and the United States circuit court have concurrent original jurisdiction on *habeas corpus* to inquire into the constitutionality and validity of a city ordinance alleged to have been passed in contravention of the fourteenth amendment to the constitution of the United States. But the circuit court should not overrule the solemn judgment of the supreme court of the state upon this question where there is reasonable ground for doubt. In such cases the question should be referred to the supreme court of the United States for an authoritative decision of the doubtful point.
2. **SAME—LAUNDRY ORDINANCE—CONSTITUTIONAL LAW.**—On this ground the circuit court declined to hold a city ordinance invalid, as being in contravention of the fourteenth amendment to the constitution of the United States, which ordinance made it an offense "for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone."

Before SAWYER, Circuit Judge, and SABIN, District Judge.

Mr. Hall McAllister, Mr. D. L. Smoot and Mr. A. L. Van Schaick, for the petitioner.

Mr. Alfred Clarke, contra.

By the court, SAWYER, Circuit Judge. In the *Laundry Ordinance Case*, 7 Saw. 531, Mr. Justice Field and myself held ordinance No. 1679 of the city and county of San Francisco to be void under the fourteenth amendment of the na-

Opinion of the Court—Sawyer, C. J.

[January,

tional constitution, on the ground that as a condition of obtaining a license, the party desiring to carry on that business, must obtain the consent of the board of supervisors, which could only be granted upon the recommendations of not less than twelve citizens and taxpayers in the block in which the laundry was to be carried on; and we, also, held that a party arrested for violation of that ordinance was entitled to be discharged on writ of *habeas corpus* by the circuit court of the United States under the provisions of section 753 of the revised statutes of the United States. In the course of the decision in that case, Mr. Justice Field observed, that in neither case, can licenses “be required as a means of prohibiting any avocations of life which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety; *nor can conditions be annexed to their issue which would tend to such prohibition.* The exaction for any such purpose, of a license to pursue a vocation of this nature, or making its issue dependent upon conditions having such a tendency, *would be an abuse of authority. Such is evidently the tendency and purpose of the condition required in the ordinance in question in this case, and we have no doubt of its invalidity.*” (7 Sawyer. 531). And such must, necessarily, be the *tendency* of any ordinance, that requires the consent, which may be arbitrarily given, or withheld, at the discretion, of the board of supervisors, or of any other body or person, as a condition precedent to the exercise of a lawful and necessary calling.

Soon after that decision, the board of supervisors passed another ordinance, No. 1691, omitting the requirement of the assent of twelve citizens, and taxpayers in the block; but it still prohibited carrying on a laundry business, after complying with numerous onerous conditions, without in addition “having first obtained a license, or permit, therefor, duly granted by resolution of the board of supervisors.” It prescribed no specific conditions, the performance of which should entitle the party to a license, or permit; but the license, or permit, after performance of all the other prescribed conditions, still depended upon the will, or

1886.]

Opinion of the Court—Sawyer, C. J.

pleasure, of the board of supervisors. It simply struck out the consent of the twelve taxpayers on the block, and left it to rest upon the consent of the board alone, thereby limiting the number of parties to the consent, without abandoning the principle. For this reason, in *Tom Tong's* case, the circuit judge thought the objection still remained unobviated. On this point, we think, he is, also, sustained by authority. (*Mayor of Baltimore v. Radecke*, 49 Md. 217; 33 Am. Rep. 243-245). In that case, in commenting upon the ordinance then under consideration, the court says:

“It commits to the unrestrained will of a single public officer, the power to notify every person, who now employs a steam engine, in the prosecution of any business in the city of Baltimore, to cease to do so, and by providing compulsory fines for every day's disobedience of such notice, and order of removal, renders his power over the use of steam in that city, practically, absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide, or control his action. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented. It is clear, that giving and enforcing these notices, may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld, may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest, or comment upon, the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power, hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.” And it can make no difference that the arbitrary discretion is reserved to a board, instead of a single individual. Indeed, where the power is reserved to a board, there is a divided responsibility, and each member is less sensi-

Opinion of the Court—Sawyer, C. J.

[January.]

tive to its pressure upon his individual conscience. Each gives countenance and support to the others who act with him. Thus they mutually sustain each other, and break the force of the weight of responsibility.

The district judge, of this district, however, not being satisfied, we certified a division of opinion to the supreme court, thereby submitting the question for its decision as to the constitutionality of the new ordinance. The points of difference appear in *ex parte Tom Tong*, 108 U. S. 557. See especially points 3 to 6 inclusive. Unfortunately—the party being confined for an offense against the laws—we supposed the certificate to be governed by the provisions of the statute relating to criminal cases, but the supreme court held the practice in civil cases to be applicable, and declined to take jurisdiction, because a final judgment had not been rendered, before the writ of error was sued out. Thus, our misapprehension of the practice prevented a decision of the important, vigorously litigated, and vital questions presented. Had that case been decided, probably, there would not have been any occasion for this case, as the principle involved would have been, authoritatively, settled. But we are ourselves unable to distinguish this case from either of the preceding. If the court was right in those cases, then, it seems to us, that the ordinance now in question must be void upon similar grounds. Section 1 provides that “It shall be unlawful from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed of either brick or stone.”² Thus, in a territory some ten miles wide, by fifteen, or more miles long, much of it, still occupied as mere farming and pasturage lands, and much of it unoccupied sand banks, in many places without a building within a quarter or half a mile of each other, including the isolated, and almost wholly unoccupied Goat Island, the right to carry on this—when properly guarded—harmless and necessary occupation, in a wooden building, is not made to depend upon any prescribed conditions, giv-

1886.]

Opinion of the Court—Sawyer, C. J.

ing a right to anybody complying with them, but *upon the consent, or arbitrary, will of the board of supervisors.*

In three fourths of the territory covered by the ordinance, there is no more need of prohibiting or regulating laundries than if they were located in any portion of the farming regions of the state.

Hitherto the regulation of laundries has been limited to the thickly settled portions of the city. Why this unnecessary extension of the limits affected, if not designed to prevent the establishment of laundries after a compulsory removal from their present locations, within practicable reach of the customers of their proprietors?

And the uncontradicted petition shows that all Chinese applications are, in fact, denied, and those of Caucasians granted—thus, in fact, making the discriminations in the administration of the ordinance, *which its terms permit.*

The fact that the right to give consent is reserved in the ordinance, shows, that carrying on the laundry business in wooden buildings, is not deemed, of itself, necessarily, dangerous. It must be apparent to every well-informed mind, that a fire, properly guarded, for laundry purposes, in a wooden building, is just as necessary,—and no more dangerous, than a fire for cooking purposes, or for warming a house.

If the ordinance under consideration is valid, then the board of supervisors can pass a valid ordinance preventing the maintenance in a wooden building, of a cooking-stove, heating apparatus, or a restaurant, within the boundaries of the city and county of San Francisco, without the consent of that body, *arbitrarily*, given, or withheld, as their prejudices, or other motives may dictate.

If it is competent for the board of supervisors, to pass a valid ordinance prohibiting the inhabitants of San Francisco from following any ordinary, proper, and necessary, calling, within the limits of the city and county, except at its arbitrary and unregulated discretion and special consent—and it can do so if this ordinance is valid—then, it seems to us, that there has been a wide departure from the principles that have, heretofore, been supposed to guard

and protect the rights, property, and liberties of the American people.

And if by an ordinance general in its terms and form, like the one in question, by reserving an arbitrary discretion in the enacting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and, in effect, nullifying the provisions of the national constitution, then the insertion of provisions to guard the rights of every class and person in that instrument was a vain and futile act. The effect of the execution of this ordinance in the manner indicated in the record would seem to be, necessarily, to close up the many Chinese laundries now existing, or compel their owners to pull down their present buildings, and reconstruct of brick or stone; or to drive them outside the city and county of San Francisco to the adjoining counties beyond the convenient reach of customers, either of which results would be little short of absolute confiscation of the large amount of property shown to be now, and to have been for a long time, invested in these occupations. If this would not be depriving such parties of their property without due process of law, it would be difficult to say what would effect that prohibited result.

The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially, those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital.

If the facts appearing on the face of the ordinance, on the petition and return, and admitted in the case, and shown by the notorious public and municipal history of the times, indicate a purpose to drive out the Chinese laundrymen, and not merely to regulate the business for the public safety, does it not disclose a case of violation of the provisions of the fourteenth amendment to the national constitution, and of the treaty between the United States and China in more than one particular?

1886.]

Opinion of the Court—Sawyer, C. J.

Does not the petition and return, as, clearly, as in the laundry case, present a case within the purview of the observations of Mr. Justice Field quoted from that case? We are, ourselves, unable to distinguish this case, in principle, from the laundry case. If this means prohibition of the occupation, and a destruction of the business and property of the Chinese laundrymen in San Francisco—as it seems to us this must be the effect of executing the ordinance—and not merely the proper regulation of the business, then there is discrimination, and a violation of other highly important rights secured by the fourteenth amendment and the treaty.

That it does mean prohibition, as to the Chinese, it seems to us must be apparent to every citizen of San Francisco, who has been here long enough to be familiar with the course of an active and aggressive branch of public opinion and of public notorious events. Can a court be blind to what must be, necessarily, known to every intelligent person in the state? (See *Ah Kow v. Nunan*, 5 Sawy. 560; *Sparrow v. Strong*, 3 Wall. 104; *Brown v. Piper*, 91 U. S. 42.)

But the supreme court of the state, in the recent case of *Yick Wo*, 8 West Coast Rep. 548, has sustained this ordinance in all its parts, both as a valid ordinance under the state constitution, and under the provisions of the fourteenth amendment, and the treaty with China. Although the court does not discuss fully the latter aspect of the case, it announces its view to be, that the points are covered by the principles declared in *Barbier v. Connolly*, 113 U. S. 27, and *Soon Hing v. Crowley*, Id. 703. We are, ourselves, unable to put the same construction on the rulings in those cases, or upon the effect, of the principles announced. We have no reason to find fault with anything decided in those cases, as we understand them, but it does not appear to us, that these cases go far enough to cover the points now raised. The question, now decided, does not appear to us to have been presented in either of the cases. Indeed, the writer of this opinion, himself, denied the writ of *habeas corpus* in *Soon Hing v. Crowley*, on the same grounds adopted by the supreme court, on writ of error to this court. He did not

Opinion of the Court—Sawyer, C. J.

[January,

consider, that that case presented the same points decided in the laundry and *Tom Tong* cases. That ordinance reserved no arbitrary discretion to grant, or refuse, a permit. It provided for a license, upon complying with prescribed conditions. Its validity was recognized, and we have never denied, and we do not now deny, the power of the board of supervisors to properly regulate, by reasonable conditions, prescribed in advance, the carrying on of this, or any other business in such a manner, as to render it reasonably safe.*

The case of *Yick Wo* was argued before the state supreme court *in bank*, but the opinion was prepared by the commissioners, and the case decided against the petitioner by the court, for the reason stated in the opinion of the commissioners. It thus had the approval, after full and solemn argument, both of the full court, consisting of seven judges, and of the three commissioners. In view of this decision, and of the views of the district judge of this district in *Soon Hing's* case, wherein we divided in opinion, we do not feel sufficient confidence in our own views in opposition to the apparent greater weight of judicial authority in this state, to justify us in holding, the ordinance to have been passed in contravention of the provisions of the fourteenth amendment, and of our treaty with China, or in discharging the petitioner on that ground.

This court has no appellate power over the courts of the state, and the writ of *habeas corpus* cannot be used to perform the functions of a writ of error. (*Ex parte Reed*, 100 U. S. 23.) As to the question on *habeas corpus* there is only a concurrent jurisdiction with the state supreme court. The judgment of this court is no more binding on the state court, than is that of the state court on this court. It is only a question as to how the judgment of a court of the dignity of the supreme court of California should be regarded and treated by an inferior court of the United States on a question fairly open to doubt, until that doubt shall be resolved

*NOTE.—The Supreme Court of the United States, at the October term, 1885, reversed the case of *Yick Wo*, on writ of error, and affirmed the views expressed in this opinion. 118 U. S. 356.

1886. J

Opinion of the Court—Sawyer, C. J.

by a court whose decision is controlling, and binding on both. Although the statute imposes upon us the duty, which we could not, if we would, escape, of investigating and deciding all cases wherein a party alleges himself to be imprisoned in violation of the constitution, laws, and treaties of the United States, even where held in pursuance of a judgment of a state court, yet we do not conceive it to be our duty to overrule the action of the supreme court of the state, unless it be upon the clearest, and most indubitable, grounds. And especially so, since the act of last winter has given an appeal by means of which the party can have any question of difference between the local state and United States courts, authoritatively determined by a tribunal to the decisions of which all must yield obedience. Besides, a writ of error lies to the state supreme court from the supreme court of the United States, and this is the regular mode appointed by law for a review by an appellate tribunal of the questions involved. This is a case, under the circumstances, peculiarly proper to be left to the final arbitrament of that tribunal. A conflict between the supreme court of the state, and the United States circuit court, in regard to a matter open to reasonable doubt, as this, clearly is, over which they have concurrent original jurisdiction, would be very undesirable, and should be avoided when practicable, and especially so, where the party can have any error of either court corrected in the ordinary and regular course of judicial proceedings on writ of error or appeal. (*Burgess v. Seligman*, 107 U. S. 34.)

The prisoner will be remanded in deference to what appears to us to be the greater weight of judicial authority in this state, but if desired, an appeal will be at once allowed, and it is to be hoped that both parties and the United States supreme court, will co-operate to procure a speedy decision of a case that involves the interests—the *all*, we may say—of so large a number of Chinese residents, who have been for many years pursuing their peaceful, and useful avocations in the laundry business in San Francisco, without any serious injury to the city, or its citizens, but to the great convenience of many.

Let the writ be discharged and the petitioner remanded.

UNITED STATES v. CENTRAL PACIFIC RAILROAD COMPANY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JANUARY 29, 1886.

1. **RAILROAD LAND GRANT WITHIN MEXICAN GRANTS.**—Under the act of 1866 (14 Stats. 239), granting land to aid in the construction of the California and Oregon railroad, lands outside the forty-mile limit of the specific grant, and within the exterior limits of an alleged Mexican grant, are subject to selection in lieu of the alternate odd sections otherwise disposed of, at the time of the definite location of the road, situated within the forty-mile limit, at any time after the final rejection of such Mexican grant.
2. **LIEU LANDS.**—The grant does not attach to the odd sections of lands outside the forty-mile limit of the specific grant, until the selection is, actually, made by the railroad company under the direction of the secretary of the interior, in lieu of lands otherwise disposed of within said limit.
3. **SAME.**—If at the time such selection of outside-lieu lands is made, a claim under a Mexican grant embracing the lands selected within its exterior limits, has been finally rejected, the lands have ceased to be *sub judice*, and are subject to selection.
4. **PREMATURE SELECTION.**—Although such lieu lands have been selected and patented, prematurely, before the final rejection of the grant, yet, in a suit by the United States to vacate the selection and patent, commenced long after the final rejection of the grant, on the ground that it was issued by mistake, will not be sustained, where it does not appear, that any private party has acquired any interest in the lands so selected, or that the government has become subject to any obligation in relation to said land, and has sustained no injury by reason of such premature selection, and patent.
5. **SAME.**—In such case, if the patent were vacated, the railroad company would now be entitled to select an equal amount of other lands within the limits, and even to select the same lands, they being *now* subject to selection, and to receive a new patent therefor. A court of equity will not correct a mutual, innocent, mistake from which no injury can result, when it would be inequitable to do so. It will not do a vain thing.
6. **INDISPENSABLE PARTIES.**—The owners of the land at the time of filing a bill in equity to vacate a United States patent are indispensable parties to the bill; and where it appears at the hearing, that the bill is filed, only, against parties who have no interest in the lands, it will be dismissed for want of necessary parties.
7. **EXTERIOR BOUNDS OF MEXICAN GRANT.**—Where three exterior boundaries of a Mexican grant, and the quantity of land are designated, the fourth exterior boundary is found by running a line parallel to the opposite boundary, a sufficient distance therefrom, to include the quantity of land called for.

1886.]

Opinion of the Court—Sawyer, C. J.

8. STATUTE JULY 25, 1866 (14 Stats. 239), construed; *Newhall v. Sanger*, 92 U. S. 761, distinguished. This case same as *Ryan v. Central Pacific Railroad Company*, (5 Sawy. 260, affirmed in 99 U. S. 382.)

Before SAWYER, Circuit Judge.

Mr. S. G. Hilborn, for complainant.

Messrs. Bennett & Wigginton, for respondent.

SAWYER, Circuit Judge. This is a suit on the part of the United States, to vacate three patents, alleged to have been improperly issued, by mistake, to respondent, for lands under the congressional grant to the California and Oregon Railroad Company, to aid in the construction of a railroad under the act of July 25, 1866. (14 Stats. 239.) The patents cover, in the aggregate, something over twenty thousand acres. It is alleged, that, at the time the grant attached by the definite location of the road, the lands were within the exterior limits of a Mexican grant, a claim for confirmation of which, was, then, pending, and undetermined in the courts; and being *sub judice*, they were not public lands, and, therefore, not within the terms of the grant. The dates of the patents, respectively, are March 5, 1872, March 17, 1875, and December 20, 1875. The plat of definite location provided for under the act, was filed on July 1, 1867.

The alleged Mexican grant to Dias was presented for confirmation, August 31, 1852, and rejected by the Board of land commissioners, as invalid, October 30, 1854. The district court affirmed the decision rejecting the grant, March 15, 1858. On July 1, 1857, the claim was again rejected by the circuit court, and the decree of the circuit court was affirmed, on appeal, and the grant finally rejected by the United States supreme court, March 3, 1873. The grant, therefore, never had the approval of any one of the four tribunals, through which it passed; and the original decree of 1854, rejecting it, was affirmed by each—showing that there never was any merit in the claim under the alleged grant.

It, thus, appears, that the first patent sought to be vacated was issued before the final rejection of the grant; and

the other two, more than two years, and two years and nine months, respectively, after its final rejection. It is insisted, on the part of complainant, that the grant attached to the specific lands, on the filing of the map of definite location, in 1867, before the final rejection of the Mexican grant, and that the lands being, then, *sub judice*, they were not public lands, and not within the terms of the grant, as held in regard to the Moquelemos grant, in *Newhall v. Sanger*, 92 U. S. 761. But these lands occupy a position entirely different from those involved in that case, and are not within that decision. None of these lands are within the forty-mile limit of the grant, to the specific odd sections of which, the grant, by virtue of the act *ipso facto* attaches by the filing of the plat of definite location. The act grants "*every alternate section of public land, not mineral, designated by odd numbers,*" to the number of ten, on each side of the road, or within a limit of forty miles, or twenty miles on each side; and, then, provides, that, "when any of said alternate sections, or parts of sections, shall be found to have been *granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the secretary of the interior, in alternate sections, designated by odd numbers as aforesaid, nearest to, and not more than ten miles beyond the limits of said first named alternate sections*"—that is to say, within ten miles outside of the forty-mile limit. The grant, in such cases, does not attach to the specific sections of outside lands, on the filing of the plat, but, it remains a mere "*float,*" until it is ascertained that there is a deficiency within the limits of the specific grant, and until the selections outside are, in fact, made, under the direction of the secretary of the interior.

The grant does not attach to the specific alternate sections of lieu lands, until the selection is so made by the company, which has the right of selection, and recognized, and adopted by the secretary. If at the time the selection is so made, recognized, and adopted, the lands have ceased to be *sub judice*, and are subject to grant, the rights of the company rest, and are valid.

This point is settled in the case of *Ryan v. The Central Pacific Railroad Company*, arising under the same grant to the Oregon and California Railroad Company, and affected in precisely the same way by the claim under the same alleged Mexican grant to Dias, 5 Sawy. 260, affirmed on appeal by the United States supreme court, 99 U. S. 383. Also, affirmed in *St. Paul R. v. Winona Railroad*, 112 U. S. 731. See also, *Grinnell v. Railroad Co.*, 103 U. S. 739; *C. R. R. Co. v. Herring*, 110 U. S. 27; *K. P. R. Co. v. A. T. & S. F. R. Co.*, 112, *Ib.* 614. The land involved in Ryan's case was embraced in one of these very patents, that of March 17, 1875, and the case is, therefore, decisive on the identical question now presented. Both the circuit, and supreme courts, distinguished that case from *Newhall v. Sanger*, on the principle, hereinbefore, stated. The lands covered by the last two patents set out in the bill, are situated precisely as the lands in Ryan's case were, under the same grants, and judicial proceedings. They are all lieu lands, situate outside the forty-mile limit, and required to be selected before the congressional grant attached. The lands were selected, and patented, after the rejection of the Dias grant, and after they had ceased to be *sub judice*. The title is, therefore, perfect, as to the lands covered by the two patents issued in 1875, as is settled by the cases cited. The patents were, therefore, properly, issued, and as to those two patents, the bill must be dismissed.

The only difficulty I have in the case, relates to the first patent, issued in 1872, before the final rejection of the claim under the Dias grant; and, while the lands so selected, and patented, were still *sub judice*, and for that reason, only, at the time, not subject to selection under the decision of *Newhall v. Sanger*. The lands embraced in this patent were also, all lieu lands, situated outside the forty-mile limit of the specific grant. They are, therefore, in an entirely different position from those inside the forty-mile limit. Those inside the forty-mile limit, under the decision of *Newhall v. Sanger*, being *sub judice*, at the time the grant attached to the specific odd sections, were not within the terms of the grant, at all, but were regarded, in a certain sense, as

otherwise disposed of, and the subsequent removal of the cloud over them, did not bring them within the grant. But being reserved, or so otherwise disposed of, as to prevent the attaching of the congressional grant, congress provided for supplying the deficiency, not out of these same lands after the claim should be rejected, but out of other outside lands that should be open to grant, when the selection should be made. Congress intended that the company should have its ten sections of land to a mile of the road, and, provided, that the lands outside might be selected, in lieu of those, already, appropriated, inside. In Ryan's case, the supreme court held, that the deficiency may be made up by selections made outside, at any time after any lands covered by a pending claim are released from that claim; after they cease to be *sub judice* and become, in every sense, public lands, open to other disposition. Now, the only difficulty in regard to this patent, is, that the selection, and patent, were *premature*. Had the company waited till after the rejection of the Dias claim, before selecting, the selection and patent of identically the same lands, would have been good. If this selection and patent fail, the defendant has not yet received all the lands to which it is entitled; and it is still entitled to select an equal amount of outside lands, within the prescribed limits, provided a sufficient quantity of unappropriated lands, is left for the purpose. It does not appear that anybody else has acquired any interest in these lands patented, and since they are patented it is not probable that any adverse interest in them has been acquired. If this patent should be vacated, therefore, being no longer *sub judice*, the defendant would, *now*, be entitled to select these identical lands, to compensate for the loss, and receive another patent for them. The Dias grant, having long since been finally rejected, the lands would be now open for selection, in pursuance of the decision in Ryan's case. The result might be only the substitution of another patent to the same lands, for the one vacated, at a great deal of further trouble and expense, both to the United States, and to the respondent.

The very defense to this suit, brought long after the final

rejection of the grant, and the claim now set up to the lands under these patents, is a manifestation, now, of an intent to select those lands. Morally, and legally, the defendant is, at this time, clearly, entitled to have these identical lands, there being no adverse claims to them. There is, really, no equity shown, now, in favor of the government. On the contrary, the equities are all in favor of the defendant. The government has realized all the benefits to be derived from the construction of the road. It made the same innocent mistake, if mistake there was, made by the defendant, whereby the defendant may lose a part of its lands, and treated these lands as subject to grant, and having done so, it has, presumably, received double the ordinary price for the alternate even sections. So that it has, in fact, given away nothing and lost nothing. It has received all it ever would have received, had the grant not been made, and the road either not been built or been built. The government is not, and it never would have been entitled to anything more. Whereas on the other hand, the defendant, in case of the vacation of the patent, has not got its full consideration—has not got all the land to which it is entitled, and which the government is bound to give, and it is now, entitled to select the very same lands, should the patent be vacated. In fact, the probability is, that all the other lands have, already, been sold by the government, and the purchase-money received by it, so that there will, at this time, be no lands, except these out of which the grant can be satisfied. It does not appear, that the United States has assumed any obligation to any other persons with respect to these lands, or that they can in any way sustain any injury by the action already had, *merely prematurely* taken, or that anybody else has acquired any adverse interest, or claim, in the lands, or will in any way suffer by reason of these patents.

The vacation of this patent would involve the necessity of issuing another for the same, or an equal amount of other lands, if any there be—of substituting a new patent for the one vacated. Courts of equity will not do a vain thing—will not sustain a bill where no injury results from a mere

innocent error in fact, or law, upon which it is based—and, especially, where that error consists merely in doing a little earlier than it should be done, a thing entirely proper to be done at the right time, and, which, if now undone, must be done over again. “Courts of equity do not any more than courts of law sit for the purpose of enforcing moral obligations, or correcting unconscientious acts *which are followed by no loss or damage?*” (1 Story’s Eq. Jur. 203.) Much less will it interfere where no injury results, and there is only a mutual innocent mistake, there being no moral wrong, and where to correct the mistake, in favor of the party complaining would be inequitable, and work an injury to the other party. Besides, if these lands are, now, lost, all others open to selection having at this day been disposed of, by reason of a change of circumstances the parties could not be placed in *statu quo*. (1 Story’s Eq. Jur. 138 a, 138 c.)

I think this patent is, now, within the principles established in Ryan’s case; on these grounds the bill as to this patent, also, should be dismissed.

A large portion of the lands—some six thousand acres, I believe—covered by these patents, and indicated in the answer and evidence, were conveyed in fee-simple, absolute, to various parties before the filing of this bill, and the defendant had at the commencement of this suit, and it now has, no interest whatever in them. There is no party to the bill having any interest in these lands. No decree can be made affecting those lands without having the holders or somebody before the court having an interest in them. (*United States v. C. P. R. Co.*, 8 Sawyer, 81.) The grantees of the patentee of these lands are, indispensable, parties to the suit. The bill must be dismissed as to those lands on this ground also.

So, also, the defendant has conveyed all of these lands, in trust, to secure the payment of ten millions of bonds issued and put upon the market. Although the respondent is interested in the *residuum* after paying the bonds, and is, therefore, a proper, and, doubtless, a necessary party, as to all the lands not, absolutely, conveyed, as before stated, there is no bondholder, trustee, or representative of the

bondholders, made a party to the suit, and no decree can be made affecting their rights, without their presence.

It is but just to observe, on behalf of the government, that this suit was commenced *after* the decision of *Newhall v. Sanger*, 92 U. S. 761, and *before* the decision in *Ryan v. C. P. R. R. Co.*, 99 Id. 382, and in all probability, without noticing the distinction established by the latter case, which takes this suit out of the rule laid down in the former. Had the latter case been decided before the commencement of this suit, it is but reasonable to presume, that it never would have been instituted.

The answer *denies*, that certain portions of the lands embraced in the first patent of 1871, and some embraced in the other patents, were within the exterior boundaries of the Dias grant, and alleges that they are, wholly, outside those boundaries. If this be so, those lands, so situated, are, in any event, properly patented to the defendant, and the title to them is perfect. Whether they are within the exterior boundaries of the Dias grant or not, depends upon how those boundaries are located, and, probably, no two surveyors, if left to themselves, would have located them alike. Surveyor-general Hardenburg located them in 1873, and Colonel Von Schmidt again located them in 1880, under the direction and supervision of surveyor-general Wagner, and, I presume, expressly, for the purposes of this suit, as I know of no other occasion for their determination, but these locations differ very widely. In my judgment, Wagner's location is much more accurate than Hardenburg's. Wagner's seems to have been located upon the principles stated and approved by Mr. Justice Field in *Henshaw v. Bissell*, 18 Wall. 262, decided after Hardenburg's location was made. Says Mr. Justice Field: "With the breadth of the tract stated, the quantity limited, the southern and eastern lines designated, all the elements are given essential to the complete identification of the land. A grant of land thus identified, or having *such descriptive* features as to render its identification a matter of absolute certainty, entitled the grantee to the specific tract named." (Id. 262.)

I think upon the principle, thus stated, we have the ele-

ments from which the exterior boundaries of the Dias grant can be ascertained with reasonable certainty. It is described in his petition, and the annexed *desino*, which was an unusually good one. We find from these documents, that his grant was "joining to the north with Mr. Larkin's farm, to the south with the plains, also vacant; to the east with lands already solicited, and to the west by the mountains; and the quantity was eleven square leagues. Turning to the *desino* we find it platted in a parallelogram, as bounded on the north by Larkin's land, beyond which we cannot go, on the east by Jimeno's grant, on the south by a line drawn at right angles to the westward from Jimeno's west line, on the south of which line the lands, for a distance of many miles, appear to be vacant. The mountains are sketched to the west.

Thus we have all the elements for locating the grant with proximate and reasonable precision. Larkin's line on the north, Jimeno's on the east, the mountains on the west, and the quantity. Taking these given boundaries, and the fourth can only be drawn just far enough south to take in, with the other three boundaries, eleven square leagues of land. On any other principle there would be no certainty whatever, for the south line might just as well be drawn fifty miles further south, as five.

This appears to me to be the only reasonable way of determining the exterior boundaries of the Dias grant, and I adopt it. It seems to have the approval of the United States supreme court, and this seems to be the theory of surveyor-general Wagner's survey, in 1880, and the boundaries so located to have his approval. Upon this location of the exterior boundaries of the grant, a considerable portion of the land in the oldest patent issued, as well as in the others, lies entirely outside of the exterior boundaries of the grant, and they were *public lands, not sub judice*, at the time of the selection and patent; and were, then, subject to be taken by the railroad grant, and were rightfully patented. On this ground, also, the bill must be dismissed as to all the lands embraced in the several patents, which lie north of the south line of Larkin's rancho, and all lying

1886.]

Opinion of the Court—Deady, J.

south of a line drawn from the Jimeno ranch westward to the mountains, far enough south of Larkin's line to embrace eleven square leagues of land.

The bill must be dismissed on the several grounds indicated, and it is so ordered.

EX PARTE AH LIT, ON HABEAS CORPUS.

DISTRICT COURT, DISTRICT OF OREGON.

FEBRUARY 4, 1886.

1. POWER OF THE COUNCIL OF PORTLAND TO PUNISH FOR OPIUM SMOKING.—Subdivision 6 of section 37 of the charter of Portland authorizes the council "to prevent and suppress opium smoking, and houses or places kept therefor, and to punish any keeper of such house or place or person who smokes therein or frequents the same:" *Held*, That no person can be punished for opium smoking under this authority, unless it be done in a house or place kept for that purpose.

Before DEADY, District Judge.

Mr. Zera Snow, for the petitioner.

Mr. Albert H. Tanner, for the defendant.

DEADY, J. On December 18, 1885, a writ of *habeas corpus* was allowed by me on the petition of Ah Lit, directed to Samuel B. Parrish, chief of police, and returnable in this court, commanding him then and there to produce the body of Ah Lit, together with the cause of his caption and detention.

From the return of the writ, it appears that on December 15 the petitioner was tried and convicted in the police court of Portland, of violating section 27 of the ordinance 3983, entitled "An ordinance concerning offenses and disorderly conduct," approved October 13, 1883, which reads as follows:

"That any person who shall smoke opium in any house or place, or shall be in any house or place where opium is being smoked, without any lawful business, shall be deemed guilty of a misdemeanor, and on conviction thereof before the police judge, shall be punished by a fine of not less than

ten dollars nor more than one hundred dollars, or imprisonment in the county jail not exceeding twenty days."

By the complaint on which the petitioner was convicted he was accused of violating said ordinance, "by willfully and unlawfully conducting himself in a disorderly manner, by smoking opium in a certain house or place" therein described within the limits of Portland; and on conviction thereof was "adjudged to pay a fine of fifteen dollars and costs, and be imprisoned * * * until such fine be paid, not exceeding seven days."

By the charter, as in force, when this ordinance was passed (sec. 37, sub. 5; Ses. L. 1882, p. 151), the council had authority "to suppress bawdy houses, gaming and gambling houses, places kept for smoking opium and opium smoking, and to punish the inmates of bawdy houses, houses of ill-fame, keepers of places for smoking opium and opium smokers."

In re Lee Tong, 9 Sawy. 333, this court held, that the authority thus given to suppress gaming did not include the power to suppress any game not prohibited by the general law of the state, nor to punish any one for gaming otherwise than as prescribed by such law.

Since then section 37 of the charter has been revised and amended (Ses. L. 1885, p. 408) so as to give the council authority (sub. 6) to punish the keepers of gaming and bawdy houses and persons who frequent the same; and "to prevent and suppress opium smoking and houses or places kept therefor, and to punish any keeper of such house or place or person who smokes therein or who frequents the same."

Counsel for the petitioner contends, that the imprisonment complained of is unlawful and void on several grounds, as that: (1) The defendant holds the prisoner without a commitment of any kind; (2) Imprisonment cannot be substituted for fine; (3) The prisoner is sentenced to seven days' imprisonment unless the whole amount of the fine is paid; (4) The prisoner is not charged with or convicted of smoking opium, but with disorderly conduct and disturbing the peace; and (5) Neither the complaint nor judgment show

1886.]

Opinion of the Court—Deady, J.

that the prisoner was charged with or convicted of any offense known to the law.

It is not necessary to consider any of these points but the last one.

The power to suppress opium smoking, may, if given unqualifiedly, include the power to punish a person for a single act of smoking in his own house. But the power is not unqualifiedly given. The charter does not leave the power to punish persons for opium smoking, as a means of preventing and suppressing the same, to be implied without limitation. It expressly authorizes punishment to be inflicted therefor in certain cases, and therefore impliedly forbids it in all others.

Subdivision 6 of section 37 does not authorize the council to punish any one for smoking opium in his own house or elsewhere than in a house or place kept for that purpose—what is known, I suppose, in police jargon, as an “opium joint.” The power to punish persons, as a means of preventing and suppressing opium smoking, is limited to the punishment of those who keep houses or places for that purpose, and those *who smoke therein* or frequent the same.

This act, though intended, in the main, to control and restrain the conduct of the Chinese in this particular, must be construed in the same way as if its purpose was to prevent and suppress some practice or habit more generally prevalent—as tobacco smoking and whisky drinking, or the keeping of “joints” or places for such purpose. No one will deny that the abuse, if not the common use, of these two articles in this community, is of much greater injury to the health, peace and morals of society than the present use of opium.

But smoking opium is not our vice, and therefore we are more likely to go to extremes in our desire to suppress it, or to vex those who practice it. Indeed, it is well understood that this legislation, however right in the abstract, is not so much the result of a desire on our part to reform the “Heathen Chinee” as to annoy him. In short, it is the old story of the Puritan and the Bear. His opposition to the practice of “baiting” the beast was not because of the

pain it gave Bruin, but the pleasure it gave the parties engaged in it.

If the language used in subdivision 6, concerning opium smoking, was used in regard to whisky drinking or tobacco smoking, no one would pretend that it authorized the punishment of a person who drank or smoked occasionally or habitually in the privacy of his own or even his friend's house, and not in a place or "joint" kept for that purpose. And there is no good reason in law or morals why the act should receive any looser or different construction, because it applies only to the Chinese dissipation of opium smoking.

In re Lee Tong, supra (342), this court, in speaking of the rule for ascertaining the powers of a municipal corporation, said:

"Apart from the few faculties considered necessary to its existence, such as the capacity to sue and be sued and to have a common seal, a municipal corporation has no power to do any act except such as are essential to the plain purpose of its creation or are authorized by the express provisions of its charter or a clear or necessary implication therefrom."

So far from there being any express provision or necessary implication in subdivision six of section thirty-seven, authorizing the punishment of any one for smoking opium, elsewhere than at a house or place kept for that purpose, the contrary is the case. The express provision giving power to punish the person who smokes in a "joint," excludes any implication of power to punish otherwise from the power to prevent and suppress smoking.

But it is asked in this connection, how is the council to prevent or suppress a practice unless it may directly punish those who engage in it? Admitting that such punishment may be an effective means to that end, it does not follow that the council have or ought to have the power to impose it, under any or all circumstances. Evidently, the legislature, in passing this act, did not think it prudent or desirable, that every person in this community should be liable to have the sanctity of his home invaded and be punished by fine and imprisonment for privately inhaling the fumes of opium, either as an experiment or a habit.

1886.]

Opinion of the Court—Dedy, J.

But prevention and suppression may be more or less effected in various ways. Houses or places reasonably suspected of being used for gaming, fornication or opium smoking may be put under surveillance, and the names of persons frequenting them may be taken down and published. Police officers may be employed for this purpose; and the houses may be opened and searched for evidence to convict the keepers, inmates and frequenters.

But be this as it may, I am satisfied that the council have no power under the statute in question to punish any one for smoking opium otherwise than in a house or place kept for that purpose.

In this case the prisoner appears at most to have been simply charged with and convicted of smoking opium in a private house. And this, as we have seen, is, under the act, not a crime. He might as well have been charged with smoking tobacco or drinking whisky therein.

But I do not wish to be understood as deciding that the council has not the authority to punish opium or tobacco smoking or whisky drinking on the street or other public place as a disorderly or offensive act or conduct.

Nothing more is decided than this: Under subdivision six of section thirty-seven of the charter, the act or habit of smoking opium cannot be punished, unless it is done in a house or place kept for that purpose. That fact is an essential element of the offense and must be alleged and proved.

The caption and detention of the prisoner being clearly unlawful he is deprived of his liberty without due process of law, contrary to the constitution of the United States, and is therefore entitled to be delivered from such restraint by a habeas corpus in this court under section seven hundred and fifty-three of the Revised Statutes. Let him be discharged.

Points decided.

[February,

EX PARTE ISAAC N. HIBBS, ON HABEAS CORPUS.

DISTRICT COURT, DISTRICT OF OREGON.

FEBRUARY 4, 1886.

1. **JOINDER OF OFFENSES—TRIAL AND PUNISHMENT THEREFOR.**—When two or more distinct offenses are joined in one indictment, under section 1024 of the revised statutes, or two or more indictments therefor are consolidated, the jury may find the defendant guilty of one charge and not of another, and may find a verdict as to one or more of the charges, and be discharged from the consideration of the remainder, on which the defendant may be thereafter tried, as if a jury had not been impaneled in the case; and the defendant may be sentenced to receive the maximum punishment for each offense or charge of which the jury may find him guilty.
2. **WARRANT OF EXTRADITION—INTERPRETATION OF.**—A warrant of extradition allowed by the Dominion government under the tenth article of the treaty of 1842 with Great Britain, recited that the party was accused of the crime of "forgery," and had been committed for extradition thereon, without saying what forgery: *Held*, that resort might be had to the proceedings before the committing magistrate and his report on which the warrant issued, to ascertain what and how many forgeries the extradition was intended to apply to or include.
3. **FOR WHAT CRIME AN EXTRADITED PERSON MAY BE TRIED.**—The treaty aforesaid is not only a contract between the government of Great Britain and the United States, but it is also the law of this land; and a person extradited under it cannot be detained or tried here for a crime, unless enumerated therein and included in the warrant of extradition; and he may, if occasion require, invoke the treaty in any judicial proceeding as a protection against such detention or trial.
4. **FORGERY—WHAT CONSTITUTES.**—The postmaster at Lewiston, Idaho, issued a postal money order on the application of a fictitious person, without consideration therefor, payable to a certain bank, to which he at the same time wrote in the name of such person, directing that the amount of the order be collected and remitted to him, at Pierce city, in a registered package, which he intercepted as it passed through his office, and converted the contents to his own use: *Held*, that the act of the postmaster constituted forgery, both at common law and under the statute of the United States. (Sec. 5463, R. S.)

Before DEADY, District Judge.

Mr. Frank Ganahl, Mr. Richard Williams and Mr. George Burnett, for the prisoner.

Mr. James F. Watson and Mr. James H. Hawley, for the defendant.

1886.]

Opinion of the Court—Deady, J.

DEADY, J. On December 19, 1885, a writ of *habeas corpus* was allowed by me directed to Fred Dubois and returnable before this court, on December 24, commanding them then and there to produce the body of Isaac N. Hibbs, together with the cause of his caption and detention.

The writ was allowed on the petition of Ella Hibbs, the wife of the prisoner, alleging substantially that in July last said Hibbs was unlawfully delivered to John J. Murphy, a postoffice inspector of the United States, by "the authorities of British Columbia," on a pretended warrant of extradition, wherein he was charged with the crime of forging a certain postal money order, 22,768, and by said Murphy conveyed to Lewiston, Idaho, where he was indicted for said crime and "duly acquitted thereof;" but that said Dubois has nevertheless taken said Hibbs into his custody, and is transporting him to Decatur, Illinois, there "to be tried upon an alleged and pretended charge of uttering forged money orders," which crime is not mentioned in said pretended warrant of extradition; that the petitioner is unable to ascertain the tenor of the pretended process on which said Hibbs is detained, but she believes and is advised by counsel that the same is illegal, because there is no legal process whatever to authorize the restraint of said Hibbs; and that the said Dubois is about to transport said Hibbs through the county of Umatilla, in said district, en route to Iowa.

The writ was served on Dubois on December 21, as he was passing through Umatilla county with Hibbs in his custody, and by an arrangement between counsel, he had until January 4th to produce the body and make his return to the writ; at which time an order was made committing Hibbs to the jail of this county pending the proceeding.

Owing to the great delay in getting copies of papers from Victoria and Lewiston, the proceeding, by consent of counsel, was delayed from time to time, so that the return was filed on the 7th inst. and the reply thereto on the 15th.

The case was heard on the 15th, 16th and 18th inst., and during the argument, by consent of counsel, copies of the complaint before the committing magistrate at Victoria, in

Opinion of the Court—Deady, J.

[February,

British Columbia, under the Canadian "extradition act of 1877," together with his "judgment" and certificate of committal to the minister of justice of the Dominion government, and the record of the proceeding in *U. S. v. Hibbs*, in the district court, at Lewiston, were put in evidence, with the understanding that the facts stated therein should have weight in the consideration and determination of the case according to their legal effect.

From the pleadings and papers, it appears that on July 27, 1885, Mr. John Murphy, a postal inspector of the United States, made a complaint at Victoria, in British Columbia, before Hon. Mr. Justice Crease, of the supreme court of said province, under the Canadian extradition act of 1877, in which he accused the prisoner, Isaac N. Hibbs, of the crime of forging and uttering, at Lewiston, Idaho, while acting as postmaster thereat, postal money order 22,768 with intent to defraud the United States; and on July 29 made another complaint under said act before said justice, in which he accused said Hibbs of forging and uttering at the same place, and while so acting as postmaster, thirty-five other postal money orders, numbered between 22,647 and 22,810 both inclusive, with intent to defraud the United States; that said orders were drawn on the 9th, 10th and 11th of April, 1885, for the sum of \$100 each—six of them being drawn on each of the following offices: Leadville, Colorado; Decatur, Illinois; Kearney, Nebraska; Lake City, Minnesota; Plankington, Dakota, and at Nebraska City, Nebraska; and that said Hibbs, on May 2, 1885, did forge the name of J. G. Wilson on the backs of three drafts, dated April 24, 1885, and drawn by the National bank of Nebraska City on the National bank of Omaha in favor of said Wilson for two hundred dollars each, which drafts were so issued in payment of the six orders drawn by Hibbs on the office at Nebraska City, and were thereafter negotiated by him through the National bank at Lewiston.

After an examination of the case Mr. Justice Crease held the prisoner for extradition, under the tenth article of the treaty of August 9, 1842, with Great Britain, on all the charges made against him, as appears by "the judgment"

1886.]

Opinion of the Court—Dedy, J.

which he then delivered and refers to in his report to the minister of justice; and on July 31, he issued a warrant committing Hibbs to the common jail of Victoria, "on the ground of his being accused of the crime of forgery within the jurisdiction of the United States of America" until duly discharged.

From this "judgment" it also appears that Hibbs, as postmaster, wrote letters of advice to the postmasters at the several offices on which these orders were drawn, informing them that the same were purchased by J. G. Wilson or W. H. Dent, fictitious persons, so far as appears, and were payable to certain banks, naming them, to which latter he at the same time wrote letters in the name of such purchaser, enclosing the orders and asking that they be collected and the funds remitted to the writer in a registered letter, directed to Pierce City, Idaho, which being done, the packages passed through his office, at Lewiston, and were taken out by him and the contents converted to his own use; that no application was made for any of these orders, and no money paid for any of them; and that the prisoner confessed, when arrested, to having obtained by this means over twenty thousand dollars.

On September 10, 1885, a warrant for the extradition of Hibbs was issued by the minister of justice, addressed to the keeper of the common jail at Victoria and to J. J. Murphy. It recites that Isaac Newton Hibbs, accused of the crime of forgery within the jurisdiction of the United States of America, "was delivered into the custody of said keeper by the warrant of Mr. Justice Crease aforesaid, to await his surrender to the United States of America," and that an application for a writ of *habeas corpus* made to the supreme court of British Columbia by said Hibbs was refused, and commands said keeper to deliver Hibbs to the custody of said Murphy, and the latter to receive him and convey him within the jurisdiction of the United States, and there place him in the custody of any person appointed thereby to receive him.

That thereafter the said keeper, pursuant to said warrant, delivered said Hibbs to said Murphy, who thereupon con-

Opinion of the Court—Deady, J.

[February,

veyed him to Lewiston and there delivered him into the custody of the proper authority for trial on said charge in the district court for Nez Perce county, Idaho; but it does not appear that said Murphy ever had said warrant of extradition in his possession, of that the same is on file in the clerk's office of said court.

That on November 20, 1885, the grand jury of said district court found four indictments against Hibbs, thereby accusing him of the crime of forging, at Lewiston, on April 10, 1885, four certain postal money-orders for the sum of one hundred dollars each, and of uttering one such order with intent to defraud the United States, as follows: Number one, for forging order 22,773; number two, for forging order 22,768; number three, forging order 22,770 and for uttering the same, well knowing that it was forged; number four, forging order 22,771 and a letter of advice thereabout of the same number, to the postmaster at the office on which said order was drawn, stating that the same had been purchased by J. G. Wilson, and was payable to the national bank at that place—Decatur, Illinois—it being also alleged in indictments one and two that the defendant therein falsely signed and issued a letter of advice in each of said cases of the same number as the order mentioned therein, stating that the purchaser of the same was J. G. Wilson, and that it was issued in favor of the National bank at Decatur, Illinois.

On the same day a bench warrant was issued on each of these indictments endorsed—"Admit to bail in the sum of three thousand dollars"—on which Hibbs was brought into court and arraigned; when a plea to the jurisdiction in indictment one was interposed, which was argued and considered as a plea to the other three indictments also, to the effect that the indictments in each case charged a crime for which the defendant was not extradited; which plea set forth the circumstances of the arrest and extradition of Hibbs from British Columbia, substantially as above stated, but averred that the charge on which he was arrested and extradited was the forging and uttering of order 22,768, and no other. The court overruled the plea; whereupon a de-

1886.]

Opinion of the Court—Deady, J.

murrer was filed to one of the indictments on the ground: (1) That it charged more than one offense; and (2) That the facts stated did not constitute any offense; which was argued and considered as a demurrer to all four of the indictments, and overruled by the court.

On December 8, the plea of "not guilty" was entered in each case, and by consent of counsel, indictments two, three and four were ordered "consolidated for the purposes of a trial thereon," which commenced on the following day and ended on the 16th, with a verdict of not guilty as charged in the indictment "of uttering order 22,770;" or "of forging order 22,771;" and a statement that the jury were unable to agree on the charge in indictment two, for forging order 22,768, which verdict was received and the jury discharged from the further consideration of the case, and "the prisoner was remanded to custody." On the following day the court denied a motion to reduce the bail, and made an order allowing the district attorney to submit to the next grand jury "twenty-seven other charges standing against the defendant, as appears by the original complaint on file herein, and the plea to the jurisdiction of the court."

Fred T. Dubois, the defendant in this proceeding, is the United States marshal for Idaho, to whom the bench warrants aforesaid were directed and delivered, being issued, as he avers, "by and under the hand of the Hon. Norman Buck, associate justice of the supreme court of Idaho," and which are still in his possession, and by virtue of which he claims to detain the prisoner; he also avers that on December 21, pursuant to an order of the attorney general of the United States, he took Hibbs from the jail at Lewiston for the purpose of conveying him to the penitentiary at Boise, Idaho, for safe-keeping therein, pending his trial on the indictments aforesaid, and while diligently and in good faith conveying said Hibbs to said prison, he was required to pass through a portion of Umatilla county, Oregon, where he was served with the writ of *habeas corpus* as aforesaid; but the order of the attorney general appears to have been made before the extradition took place. It is dated

Opinion of the Court—Deady, J.

[February

July 13, and was made in response to a letter from the marshal, of June 22, in which he states the insecurity of the jail at Lewiston, and suggests in the event of Hibbs' extradition, that he be taken to the prison at Boise. The order provides—"you will cause said Hibbs, if he is extradited, and delivered to you, to be taken to the penitentiary at Boise city, Idaho, for confinement therein while awaiting his trial, which I understand cannot take place until the November term."

This court has no supervisory power over the district court of Idaho, and will not, therefore, undertake to enquire into the legality or correctness of its proceedings in a matter within its jurisdiction.

This writ was allowed on the allegation in the petition that the defendant was removing the prisoner to another jurisdiction for the purpose of subjecting him to a trial on a charge not embraced in the warrant of extradition. But it now appears, that the prisoner was not being conveyed beyond the limits of Idaho for any purpose, but only to a secure place of confinement therein.

Therefore, the question of whether these bench warrants are *functi officii*, because only issued to bring the prisoner into court to answer to the indictment, or whether the order of the court remanding the prisoner to custody, after the trial on the three indictments, is not itself sufficient authority for the detention of the prisoner, or whether the marshal, under section 1876 of the revised statutes, making him the executive officer of the territorial court in a case where the United States is a party, is not the person to execute that order, or whether he might not do so by confining the prisoner in the penitentiary at Boise, under section 1892 of the revised statutes, as amended by the act of June 20, 1874 (18 Stat. 112), putting that prison under the care and control of the marshal of the territory, independent of any direction from the attorney general, for which it does not appear that the statute makes any provision, in case of a prisoner merely detained for trial, unless implied in the provisions of section 362 of the revised statutes, will not be considered or decided in this proceeding. It being now conceded that

1886.]

Opinion of the Court—Dedy, J.

the prisoner is not being conveyed beyond the jurisdiction of the territorial court, so far as these points are concerned, the case will be considered as one where the prisoner may and should seek relief in that court for any detention or restraint caused by or resulting from the use or application of its process or orders, after the same have fulfilled their function or served their purpose, or the prisoner for any reason is entitled to be discharged from custody thereunder. (Hurd on *Habeas Corpus*, chap. VI., secs. 1, 2 and 3.)

On the argument a point was made by counsel for the prisoner that the effect of the trial and verdict on the consolidated indictments two, three and four, was equivalent to a verdict of not guilty generally; that the prisoner being extradited for the crime of forgery only, and but one forgery, he cannot be held under the treaty for trial on any other or further charge of forgery.

At common law, two or more distinct offenses may be joined in one indictment in separate counts when they are of the same general character and admit of the same mode of trial and are subject to the same species of punishment. (Whar. Crim. P. & P., secs. 285, 294.)

These indictments were consolidated under the last clause of section 1024 of the revised statutes, which authorizes the joinder in one indictment of "several charges against any person for the same act or transaction, or for two or more acts or transactions connected together," or of two or more distinct crimes of the same class "which may properly be joined;" and provides that if separate indictments are found in such cases the court may order them consolidated.

In cases arising out of the same act or transaction, or two or more acts or transactions connected together, where there are several counts in the indictment, it will depend on the circumstances of the case, whether, on a general verdict of guilty, as charged in the indictment, the defendant may be sentenced to more than the maximum punishment for one of the offenses charged.

But in the case of two distinct offenses, arising out of two distinct acts or transactions, however closely related in point of time or place, the trial is for distinct offenses of

Opinion of the Court—Deady, J.

[February,

which the defendant may be found guilty and receive the maximum punishment for each; and in either case the jury may find a verdict of guilty as to one count and not guilty as to another, or they may find a verdict as to one count, and being unable to agree as to the other, they may be discharged and the party held for trial on the latter count. (*U. S. v. Davenport*, 1 Deady, 264; *Ex parte Peters*, 4 Dill. 169; *U. S. v. Scott*, 4 Biss, 29; *U. S. v. O'Callahan*, 6 McLean, 596; Whar. Crim. P. & P., sec. 910; 1 Bish. Crim. Law, secs. 1060, 1062; *U. S. v. Wentworth*, 11 Fed. Rep. 52.)

The act authorizing the joinder of offenses in one indictment, and the consolidation of separate indictments for distinct offenses, was intended to promote the speedy and economical administration of justice in such cases, in the interest both of the government and the defendant, and not practically to merge two or more distinct offenses into one, for the benefit of the latter. Nor is there any reason why a party who has committed two distinct offenses, which, for the convenience of the prosecution as well as the defense, are joined in one indictment, can only be punished as for one, though found guilty of both. (Whar. P. & P., sec. 910.)

But it is still in the discretion of the court, notwithstanding the statute, to say what offenses may be properly joined or indictments consolidated, without injustice or prejudice to the defendant. In this case the charges are so similar, and the facts so few, that probably the whole thirty-nine charges against the prisoner might properly and conveniently be joined in one indictment. That such joinder might curtail the privilege of taking peremptory challenges to the jury, is not material to consider; for it would operate, in this respect, on the prosecution and defense alike. No one has any vested right to peremptory challenges, and congress may diminish or forbid them altogether.

On the argument the senior counsel for the prisoner pressed this point, and cited and relied on *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, as establishing the general doctrine that a joinder of offenses has the practical effect of fusing the whole into one crime, for which the defendant cannot be sentenced beyond the maximum punish-

1886.]

Opinion of the Court—Deady, J.

ment therefor, even when the jury find a separate verdict of guilty on each count.

There were some peculiar circumstances in this case; but I am inclined to agree with Dr. Wharton (Crim. P. & P., sec. 910), that it is not likely to become a precedent elsewhere.

According to my impression of the law, the verdict in *U. S. v. Hibbs*, disposed of indictment four and left two for trial, as if a jury had not been impaneled therein. But indictment three is in a peculiar condition. It contains two counts—one for forging and the other for uttering order 22,770. The jury found the prisoner not guilty of the “uttering,” and said nothing as to the forgery. A verdict of guilty on one count and silence as to another, is generally considered equivalent to a verdict of not guilty as to the latter. (Whar. Crim. P. & P., sec. 740.) But whether the converse of this proposition will hold good is doubtful, but not necessary to decide. No judgment was entered on the verdict, nor does any appear to have been asked for.

In any view of the matter, then, there are two indictments—one and two—pending against the prisoner in the district court of Nez Perce county, charging him with the commission of distinct forgeries, prior to his extradition. In addition to these, there are twenty-seven other charges of forgery against him, which the district attorney has leave to submit to the next grand jury.

But counsel for the prisoner insist that on the face of the warrant the prisoner appears to have been extradited for one forgery only, without specifying what one, which must therefore be taken to be the one for which he was tried and found not guilty; and assuming that the prisoner cannot legally be held or tried for any offense other than the one for which he was extradited, counsel claim that the prisoner is now illegally restrained of his liberty under process of the territorial court, which under no circumstances compatible with the facts and inferences of this argument can any longer be legal or valid for want of jurisdiction in said court over the offense of the offender.

It must be admitted that on the face of the warrant it does not appear that the prisoner was extradited for more than one forgery. And yet he may have been, for anything that appears to the contrary. The warrant simply recites that Hibbs was "accused of the crime of forgery within the jurisdiction of the United States" and that he has been committed by Mr. Justice Crease, for extradition thereon, and authorizes and commands his surrender and extradition accordingly.

The writ is ambiguous or indefinite in this particular. The word "forgery" must be interpreted to ascertain whether the warrant was intended to comprehend more than one crime. To do this, the court may consider the circumstances under which it was issued. And these are best shown by a reference to the preliminary stages of the proceeding of which the warrant is but the consummation and end.

From these it appears, that the prisoner was held by the committing magistrate on thirty-nine distinct charges of forgery, which were certified to the minister of justice for a warrant of extradition thereon. If under these circumstances, the warrant had been issued for any particular one of these charges only, as the forging of order 22,768, the first one complained of, the only conclusion possible from the premises would be, that extradition on the other charges was refused. But as the warrant authorizes the prisoner's extradition on "the crime of forgery," for which he was committed by Mr. Justice Crease, at Victoria "to await his surrender" to the United States, the only reasonable interpretation of the language is, that the Dominion government thereby intended and did surrender the prisoner for trial on all the charges of forgery on which he was so committed; and the warrant must be so construed.

But the counsel for the prisoner goes further, and contends that the prisoner cannot be legally held anywhere or for any purpose on any process issued on the indictment aforesaid, the same being absolutely void for the reason: (1) A person extradited under the treaty of 1842, for one offense cannot be charged with or tried for another: (2) The

1886.]

Opinion of the Court—Deady, J.

crime charged in the indictments herein is not forgery under the law of the United States—therefore the prisoner is being held and proceeded against thereon without law and contrary to the treaty and warrant of extradition.

The major premise of this argument involves an important and vexed question which must finally be settled by the supreme court.

By the tenth article of the treaty with Great Britain of 1842 (Pub. Treat., 320) it is agreed that the parties thereto shall, on mutual requisitions by them, "deliver up to justice all persons, who being charged with the crime of murder or assault to commit murder, or piracy or arson, or robbery or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other; provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed." The remainder of the article simply provides in detail for the arrest and surrender of the fugitive, in case "the evidence be deemed sufficient to sustain the charge."

In *U. S. v. Caldwell*, 8 Blatch. 131 (1871), it was held by Judge Benedict that the defendant, although extradited on a charge of forgery, might be indicted and tried on a charge of bribery. And while in effect admitting that this was an abuse of the extradition proceeding, that would constitute a good cause of complaint between the two governments, he decided that such complaints were not a proper subject of investigation in the courts, however much they might regret that they were permitted to arise. In short, he held that the question was not a judicial one but political, and must be referred to the executive departments of the two governments.

This case was followed by *U. S. v. Lawrence*, 13 Blatch. 295 (1876), in which Judge Benedict adhered to the conclusion reached in *U. S. v. Caldwell*.

In *Adriance v. Lagrave*, 59 N. Y. 110 (1874), the court of

Opinion of the Court—Deady, J.

[February,

appeals held that a person brought within the United States on an extradition proceeding, on the charge of burglary, might be arrested therein in a civil action—two judges, Grover and Folger, dissenting, and reversed the judgment of the supreme court to the contrary, given by Judges Daniels, Davis and Brady, thus leaving the judicial utterance of the state on the subject as six to five.

In *The Commonwealth v. Hawes*, 13 Bush. 697 (1878), the defendant was surrendered under the treaty of 1842, on the charge of forgery committed in Kentucky, for which he was tried and acquitted. He was also indicted for embezzlement, in the same court, an offense for which he could not have been extradited. A motion to put him on trial for this offense was denied by the trial court. On an appeal to the court of appeals, this ruling was affirmed, for the reason, in brief, that by a necessary implication the treaty forbid extradition except on a charge of some one of the offenses enumerated therein, and being "the supreme law of the land," a party brought into this country for trial under it, had a right to set it up, as a defense, to prosecution for any other crime while in custody thereunder.

In *U. S. v. Watts*, 8 Sawy. 370 (1882), the defendant being arraigned in the United States district court for California, on three indictments found therein, pleaded to the jurisdiction that he had been extradited under the treaty of 1842, for offenses other than those alleged in the indictment; which last are not enumerated in the treaty.

Judge Hoffman, in a very able opinion, containing an exhaustive review of the authorities, including the opinions of juriconsults and writers on international law, as well as the legislation and diplomatic correspondence on the subject, came to the same conclusions as the Kentucky court of appeals.

In *The State v. Vanderpool*, 39 Ohio St. 273 (1883), the supreme court held that a person extradited under the treaty of 1842 cannot be detained or prosecuted for a different crime, whether included in the treaty or not, than the one for which he was surrendered; and that the treaty, being a part of the law of the land, may be invoked in the courts by any person so detained or prosecuted.

1886.]

Opinion of the Court—Dedy, J.

In *ex parte Ker*, 18 Fed. Rep. 167 (1883), Judge Drummond, of the United States circuit court for Illinois, refused to issue a writ of *habeas corpus* for the deliverance of the petitioner from custody under process of a court of the state. It appears that Ker, after having been indicted in said state court for larceny, went to Peru, where he was kidnapped and brought back to Illinois and arrested for trial on said indictment. The grounds on which the writ was refused are not definitely indicated, but it was suggested that the petitioner could set the matter up as a defense to the indictments in the state courts, and, if need be, take the case from there to the supreme court on the question. But, it is apparent that the petitioner, not having been brought into Illinois under the treaty with Peru, was not in custody under color of the authority of the United States, or in violation of a treaty thereof, and therefore the United States circuit court did not have any jurisdiction to inquire into the legality thereof. (Sec. 753, R. S.; Spear on Extradition, 185.)

The weight of this array of authorities is in favor of the proposition that an extradited person cannot lawfully be detained or tried on any charge other than the one on which he was surrendered by the extraditing government.

The treaty of 1842 is not only a contract between the governments of Great Britain and the United States, but, by virtue of the constitution of the latter (Article 6), it is also the supreme law of this land. It contains an explicit enumeration of the offenses for which persons may be extradited under it, and by a necessary implication the person surrendered under it is only allowed and held within the jurisdiction of the receiving government for the purpose of trial on the charge specified in the warrant of extradition. For the latter government to detain such person for trial on any other charge, would be not only an infraction of the contract between the parties to the treaty, but also a violation of the supreme law of this land, in a matter directly involving his personal rights. (Spear on Extradition, 107.) A right of person or property, secured or recognized by treaty, may be set up as a defense to a prosecution in dis-

Opinion of the Court—Deady, J.

[February,

regard of either, with the same force and effect as if such right were secured by an act of congress.

And so the prisoner cannot lawfully be detained or prosecuted under this extradition, for the crime of uttering any of these money orders.

For although he was charged with the crime of uttering them before the committing magistrate in Victoria, he was neither committed nor surrendered on that account, but solely for the crime of forgery.

The only other question in the case is: What is the nature of the crime charged in the pending indictments one and two?

It has been determined by the proper authority of Canada, to be forgery according to the common law—the law of that country.

To what standard we must look for a definition or interpretation of the word “forgery,” as used in the treaty of 1842, may be a question. But in a convention made between two countries like Great Britain and the United States, whose language and laws have a common origin, it is more than probable that the term is used therein, in at least as broad a sense as at the common law.

There are no common law crimes against the United States, but terms used in its statutes defining crimes or making certain acts punishable, as such, are, unless the contrary plainly appears, to be taken and interpreted in the common law sense.

A statute of the United States (sec. 5463, R. S.) provides: “Any person who shall, with intent to defraud, *falsely make*, forge, counterfeit, engrave or print * * * any order in imitation of or *purporting to be* a money order issued by the post office department, or of any of its postmasters or agents, or any material signature or indorsement thereon, * * * shall be punished by a fine of not more than five thousand dollars, or by imprisonment at hard labor for not less than two years and not more than five years.”

The crime defined in this statute is the common law crime of forgery, with reference to a postal money order.

To “falsely make, forge, counterfeit, engrave or print”

1886.]

Opinion of the Court—Deady, J.

are all cognate terms used to define or designate the crime of forgery in some of its many phases.

Forgery at common law belonged to that class of misdemeanors called "cheats;" but owing to the serious wrongs and frauds thereby perpetrated, it was distinguished in time by a particular name and a special punishment. Dr. Wharton (1 Cr. L., sec. 653), citing Blackstone and East, says forgery, at common law, is "the false making or altering, *malò animo*, of any written instrument." According to Sir James Stephens (3 His. Crim. Law, 186), the accepted common law definition of forgery is "making a false document with intent to defraud." Mr. Bishop (2 Crim. Law, sec. 523), says: "Forgery, at the common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." And reduced to a briefer form, he puts it thus: "Forgery is the fraudulent making of a false writing, which, if genuine, would be apparently of some legal efficacy."

The false making of a writing is forging at common law. (*U. S. v. Wentworth*, 11 Fed. Rep. 55).

The prisoner, as postmaster at Lewiston, was intrusted with public documents designed to facilitate the transfer of small sums of money from place to place, and known as postal money orders. They were delivered to him in blank, as the agent of the postal department of the government of the United States, for safe-keeping, and with authority to fill up, sign, stamp and issue any one of them when applied to in writing for that purpose, and the amount for which it is so filled, was paid into his office, and not otherwise. Indeed, it is made a misdemeanor (sec. 4030, R. S.), punishable by fine not less than fifty dollars, nor more than five hundred dollars, for a postmaster to issue such an order, under any circumstances, without the previous receipt of the money therefor.

The instruments set out in these indictments, and of which the prisoner is thereby charged with forging, purport to be postal money orders of the United States. They were issued without authority and contrary to the prohibition of

law. They were falsely made, filled up, signed, stamped and issued by the prisoner, as upon a state of facts which did not exist, with intent to defraud his employer, the United States. This, in my judgment, was a false making within the statute, and such a false making as constitutes the crime of forgery at common law. The writing is false, because it purports to be what it is not. It purports to be a money order of the United States, issued by its authority, after the receipt by its agent of the sum named therein, on the application of a real person, while in truth and in fact it was issued without such authority and contrary to law—it was issued without the prepayment of the sum named on the pretended application of a fictitious person.

Admitting the genuineness of these instruments, and nothing appears to the contrary, they had the legal efficacy, sufficient to make them a possible or even an efficient means of fraud. (2 Bish. Crim. Law, 533). Indeed, they were calculated, and exactly calculated, to defraud the United States, by enabling the holder wrongfully to obtain from its agents, at the several offices on which they were drawn, the several sums named therein.

However, it is contended that a person cannot commit forgery by making a false writing in his own name. But it must be borne in mind that forgery is not necessarily confined to the false writing of another's name. It may be from the nature of things, that it is more often than otherwise committed in that way; but both reason and authority say that it may be committed in other ways.

In 3 Bae. Ab. 745 (Tit. Forgery, A), it is said: "The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal * * * but in endeavoring to give an appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another, which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such falsity to give it an operation, which in truth and justice it ought not to have."

And if the deceit consists in making it appear that a man's

1886.]

Opinion of the Court—Deady, J.

own act was done under circumstances which would make it valid and genuine, when in fact it was false and unauthorized, the result is the same.

In the report for 1840, of the English commissioners of the criminal law, cited by Mr. Bishop (2 Crim. Law, Sec. 584) it is said: "an offender may be guilty of a false making of an instrument, although he sign and execute it in his own name, in case it be false in any material part, and calculated to induce another to give credit to it, as genuine and authentic, when it is false and deceptive." And in *Regina v. Ritson*, 1 Law Rep., C. C. 200 (1859), the very point so suggested, was decided accordingly. A person being the owner of certain land, sold and conveyed the same to another, who went into possession. Thereafter, the vendor conveyed the greater portion of the premises to his son, by an indenture which they both executed and falsely antedated, so as to make it appear to have been executed before the real sale took place. Thereupon the son brought suit to eject his father's vendee, who, in return, caused the parties to the indenture to be indicted for forgery, of which they were duly convicted.

The judges were of the unanimous opinion that the act was forgery. Mr. Justice Kelly, C. B., said "that every instrument which fraudulently purports to be that which it is not, is a forgery, whether the falsehood of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed."

And Mr. Bishop (2 Crim. Law, 585), after a careful examination of the subject on authority and principle, concludes: "Plainly the broad doctrine is not maintainable, that it is incompetent for a man to commit forgery of an instrument executed by himself."

It may be admitted that this case is not in all particulars like any of these—that it is what may be called a new case. But in my judgment there is no difference in law or morals, in making a deed with a false date for the purpose of defrauding another, and falsely making and issuing a money

Opinion of the Court—Deady, J.

[February,

order as postmaster, without consideration or authority for the same purpose. In either case, the party does by force of his falsity and deceit, give the instrument, in the language of the authority above cited, "an operation, which in truth and justice it ought not to have."

This case also comes within the well known rule, long since established, that it is forgery for an agent, who has authority to fill with a particular sum, a blank in a paper signed by his principal, to fill it with a larger one; or to fill it at all without authority. (1 Whar. Crim. Law, sec. 671, 672).

In my judgment, the filling the blank in each of these orders with the sum of \$100 by the prisoner, when acting as the agent of the United States, contrary to his authority and the positive directions of his principal, being done with intent to defraud, was a false making and forgery thereof.

It is not necessary to consider whether the prisoner committed forgery in writing the name of J. G. Wilson on the backs of the three drafts on the bank at Omaha. Forgery may be committed by thus writing the name of a fictitious person on an instrument. If the existence of such person is a question of fact and not law, and the instrument appears to be valid on its face, the offense is complete—provided the act was done with intent to defraud. (2 Bish. Crim. Law, 543.) The fraud on the United States was accomplished when the money orders were paid to the bank for J. G. Wilson, alias Isaac N. Hibbs, and it is not apparent how he can be said to have intended to defraud any one when he put this alias on the back of these drafts for the purpose of receiving the amount due thereon. And although the money with which they were purchased may have been stolen from the United States, still the bank was not injured or defrauded by paying them to Hibbs as indorsee of Wilson, and the fraud on the United States was already perpetrated.

In conclusion, my judgment is, that the district court for the county of Nez Perce, Idaho, has jurisdiction of the prisoner and of the crime of forgery for which he was extradited and wherewith he is charged in the indictments pending

1886.]

Opinion of the Court—Deady, J.

thereon, and therefore this writ of *habeas corpus* must be dismissed and the prisoner remanded to the custody of the marshal of Idaho.

In the consideration of this case, I own, I have not been unmindful of the fact, that while the law ought not to be forced or stretched to meet this or any other emergency, it would be a reproach to the law of this country, if the prisoner could not be punished for his misconduct while acting as postmaster at Lewiston.

It does not appear that his offense is embezzlement. That crime only occurs when an agent or servant converts to his own use property entrusted to his care and possession by his principal or employer. (Rap. & Law. Dic., Embezzlement, 1 Whar C. L., sec. 1009). But the United States never entrusted Hibbs with the money he obtained from these several postmasters on these false orders or in any way gave him the possession thereof. On the contrary, he obtained such possession fraudulently, by means of these false writings; and therefore it seems, that if his conduct does not constitute forgery, it is not embraced in the category of crimes defined and punishable by law.

I also think it proper to call attention to the fact that the application for this writ was not made and verified by the prisoner, as required by section 754 of the revised statutes. The Oregon code allows the writ to issue on the petition of the person detained or that of any one on his behalf. Doubtless, counsel who prepared the application, did so under the apprehension that the proceeding was governed in this particular by the code, and it was inadvertently allowed under probably the same apprehension.

The prisoner must be remanded to the custody of the marshal of Idaho, from whence he was taken; and it is so ordered.

Opinion of the Court—Sawyer, C. J.[February,

IN RE TIE LOY, ON HABEAS CORPUS.

(THE STOCKTON LAUNDRY ORDINANCE CASE).

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

FEBRUARY 16, 1886.

1. **LAUNDRIES—CONSTITUTIONAL LAW.**—An ordinance, which makes it an offense, for any person to maintain, or carry on a laundry, wherein clothes are cleansed for hire, within the habitable portion of the city of Stockton, is unconstitutional, and void.
2. **FOURTEENTH AMENDMENT.**—Such ordinance violates the fourteenth amendment of the national constitution, in the following particulars: 1. It abridges "the privileges and immunities of citizens of the United States." 2. It violates the personal liberty of the citizen. 3. It operates to deprive the citizen of property without due process of law. 4. It deprives citizens of the equal protection of the laws.
3. **POLICE POWER.**—The ordinance is not within the legitimate scope of the police power of the state, invoked to sustain it.
4. **SECTION 753, REVISED STATUTES,** authorizes the discharge of the petitioner.

Before SAWYER, Circuit Judge.

Mr. R. W. Bennett, for petitioner.*Mr. F. H. Smith*, city attorney of the city of Stockton, and
Mr. Alfred Clarke, for respondent.

SAWYER, Circuit Judge. The petitioner is in custody upon a charge of violating the provisions of an ordinance of the city of Stockton, which reads as follows:

SECTION 1. The establishment of public laundries, and public wash-houses, where clothes and other articles are cleansed for hire within those portions of said city, other than the portions hereinafter especially mentioned, being injurious and dangerous to public health and public safety, and prejudicial to the well-being and comfort of the community, it shall be unlawful for any person or persons to establish, maintain, carry on, or conduct, or cause to be established, maintained, carried on, or conducted, any public laundry, or public wash-house, within any portion of the city of Stockton, other than that portion of said city lying west of Tule street and south of Mormon channel.

SEC. 7. Any person violating any of the provisions of

1886.]

Opinion of the Court—Sawyer, C. J.

this ordinance shall be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment.

This ordinance is much broader in its scope, than any, heretofore, considered by this court. It absolutely, and, unconditionally, forbids the keeping of a laundry for washing clothes for hire, at any point within the inhabited, and even within the habitable, part of the city of Stockton, the remainder of the city being in the uninhabitable marshes and sloughs.

The isolated position of the laundry, the character of the structure, and the perfection, or imperfection, of the appliances for rendering the operation safe, and free from unwholesomeness, and offenseivness to the senses, are not factors to be considered under the ordinance. All must go, safe or unsafe, healthy or unhealthy, offensive or not offensive. It makes no difference what the character of the work is. No decision of any court in this state or elsewhere, has been brought to the notice of the court holding an ordinance so sweeping and exclusive in its provisions to be valid, since or even before the adoption of the fourteenth amendment to the national constitution. In my judgment, the case of *Yick Wo*, recently decided by the supreme court of California, cited the other day in *Wo Lee's* case, does not reach it, either in its facts or the principles involved. This ordinance does not regulate—it extinguishes. It, absolutely, destroys, at its chosen location, an established ordinary business, harmless, in itself, and indispensable to the comfort of civilized communities; and which cannot be so conveniently, advantageously, or profitably, carried on elsewhere. On the other hand, it appears to the court that it is fully covered by the case of *Yates v. Milwaukee*, decided by the supreme court of the United States, 10 Wall. 505, which is authoritative. In that case the court says:

“The mere declaration by the city council of Milwaukee that a certain structure [a wharf] was an encroachment or obstruction, did not make it so; *nor could such declaration make it a nuisance unless it, in fact, had that character. It is a doctrine not to be tolerated in this country, that a municipal*

corporation, without any general laws, either of the city or of the state within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities."

If the rural city of Stockton, which, as usual in such cities, is, in the greater part, not compactly built up, has authority to prohibit, within its inhabited limits, the washing of clothes for hire, not only a useful, but an absolutely necessary occupation in any civilized community, it is because it has the power to declare that occupation, and every other, that may be followed by civilized man, to be a public nuisance, without regard to the question, whether it is in fact a nuisance or not. That is just what the supreme court of the United States says it cannot do.

If the city of Stockton can prohibit the washing of clothes for hire within its inhabited and habitable limits, it can prohibit the washing of clothes by any citizen, for him or herself, anywhere within the city of Stockton. Washing *for hire* cannot make the operation a nuisance, if it be not otherwise a nuisance. One may cook his dinner, in such manner, and under such conditions, as to render the operation extremely dangerous, and constitute it a nuisance. Unfortunately, this necessary and, ordinarily, harmless act, has sometimes been so performed as to be dangerous. Does it follow from this fact, that all the inhabitants of the city of Stockton, may, under the police power of the state, be, lawfully, prohibited from cooking their meals within the habitable limits of that city? It is not apparent why they may not be thus prohibited, if this ordinance be valid under the power invoked, or any other power. Indeed, if this ordinance be valid, it is difficult to perceive what rights the people of California have which a municipal corporation is bound to respect. Of course, no one can, in fact, doubt the purpose of this ordinance. It means: "The Chinese must go." And, in order that they shall go, it is made to encroach

1886.]

Opinion of the Court—Sawyer, C. J.

upon one of the most sacred rights of citizens of the state of California of the Caucasian race, as well as upon the rights of the Mongolian. It should be remembered that the same clause in our constitution which protects the rights of every native citizen of the United States, born of Caucasian parents, equally protects the rights of the Chinese inhabitant who is lawfully in the country. When this barrier is broken down as to the Chinese, it is equally swept away as to every American citizen; and in this instance the ordinance reaches American citizens as well as Chinese residents.

This occupation is not a nuisance *per se*, nor one that is *prima facie* a nuisance — like a slaughter-house, a house for the manufacture or storage of gunpowder, or dynamite, or many others that might be mentioned. It can only become a nuisance upon gross negligence, or carelessness, or gross imperfections in the arrangements and appliances by means of which it is carried on. It is one of the most common, ordinary and necessary employments, in which every one may engage, as of common right, upon terms of equality, not only as to this employment, but upon terms of equality with those who engage in any other ordinary, necessary, or useful occupation. Cleanliness is necessary to civilization — necessary to the health, comfort, and happiness of a civilized people. Without it, every man, woman, and child would, individually, him or herself, become a nuisance to his or her neighbor. The right to labor in this or any other honest, necessary, and, in itself, harmless calling, where it can be most conveniently, advantageously, and profitably carried on without injury to others, is one of the highest privileges and immunities secured by the constitution to every American citizen, and to every person residing within its protection.

In *Ward v. Maryland*, the United States supreme court observes: "Beyond doubt, these words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the rights of a citizen of one state to pass into any other state of the Union for the pur-

pose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property, to take and hold real estate," etc. (12 Wall. 430).

So in the *Slaughter-house cases*, Mr. Justice Field remarks upon these terms: "*The privileges and immunities designated are those which of right belong to citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.*" (16 Wall. 97).

Justice Bradley, in discussing the question as to what is embraced in the privileges and immunities secured to citizens, among other equally pointed and emphatic declarations, says: "*In my judgment the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations), is one of the most valuable rights, and one which the legislature of a state cannot invade, whether restrained by its own constitution or not.*" (16 Wall. 113-114). He also enumerates, as among the fundamental rights embraced in the privileges and immunities of a citizen all the absolute rights of individuals classed by Blackstone under the three heads: "*The right of personal security; the right of personal liberty, and the right of private property.*" (Id. 115). And in relation to these rights, he says: "*In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adapted, does deprive them of liberty as well as property without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws contrary to the last clause of the section.*" (Id. 122; see, also, *People v. May*, 99 N. Y. 386).

And Mr. Justice Swayne supports this view in the following eloquent and emphatic language: "*Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints, but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power*

1886.]

Opinion of the Court—Sawyer, C. J.

to dispose of it according to the will of the owner. Labor is property, and, as such, merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property." (16' Wall. 127; see *Parrott's case*, 6 Sawy. 373).

The police power is invoked to sustain this ordinance, but the police power only extends to the regulation of the necessary pursuits of man, so that they shall not become in their mode of exercise unhealthy, noisome, dangerous, or otherwise destructive or injurious to the common interests of the community. It does not extend to the destruction or driving to inconvenient, and unprofitable localities, of necessary or useful occupations, carried on in such manner as to be harmless.

It is not easy to define the police power, by general terms, in advance, so that it will embrace every case that ought to be embraced, and exclude every case that ought to be excluded. In the recent case of the *New Orleans Gaslight Co. v. Louisiana Light and Heat, etc., Co.*, the supreme court observes:

"In the *Slaughter-house cases*, 16 Wall. 62, it was said that the police power is from its nature incapable of any exact definition or limitation; and in *Stone v. Mississippi*, 101 U. S. 818, that 'it is easier to determine whether particular cases come within the general scope of the power than to give an abstract definition of the power itself, which will be in all respects accurate.'"

And the court then added: "*Definitions of the police power must, however, be taken, subject to the condition that the state cannot, in its exercise for any purpose, whatever, encroach upon the powers of the general government or rights granted, or secured by the supreme laws of the land,*" and under color of the police power, 'objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution.'" (115 U. S. 661).

It does not appear to me to be difficult to determine that this sweeping, exclusive, destructive, prohibitory ordinance, making it an offense to pursue one of the most ordinary and

Opinion of the Court—Sawyer, C. J.

[January,

necessary occupations without regard to the manner of its pursuit, or the character of the appliances with which it is carried on, is not within the police power of the state. To hold otherwise, would, in my judgment, clearly be, under color of the police power, to take in "objects not within its scope" which "cannot be secured at the expense of the protection afforded by the federal constitution," and to "encroach upon * * * rights granted and secured by the supreme law of the land," which, the supreme court says, cannot be done. If the foregoing extracts from the opinions of the justices of the supreme court give a correct idea of the privileges and immunities protected by the constitution of the United States, then this ordinance in question, it seems to me, violates that clause of the fourteenth amendment, which says: "*No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,*" for this ordinance does absolutely prohibit not only Chinese, but citizens of the United States, from following within the inhabited part of the city of Stockton, under any circumstances, one of the most ordinary, necessary, and, when properly conducted, harmless, occupations of civilized man.

Under the same definition, this ordinance also violates the clause which secures the personal liberty of the citizen. So, also, as the laundrymen have already fitted up their laundries, suitably for the purpose, and established their business, to, now, drive them out to inconvenient and unsuitable localities, would be to limit the use of their property and convert it to other purposes and uses to which it is unfitted, and to that extent, deprive them of their property and its use without due process of law, in violation of the last clause of section 2 of said amendment. So, also, to thus drive the laundrymen, unconditionally, out of Stockton, while other parties are entitled to wash clothes, not for hire, and where other parties are entitled to pursue other ordinary, and no more necessary, or less harmful occupations, is to deprive them of the equal protection of the laws within the meaning of the same inhibitory clause. Thus, it seems clear to my mind, that this ordinance violates the constitu-

1886.]

Points decided.

tion of the United States, in all the particulars indicated, and that it is utterly void. If so, the petitioner is "in custody in violation of the constitution of * * * the United States," within the meaning of section 753 of the revised statutes, and he must be discharged.

The respondent relies upon article 11, section 11, of the state constitution, to sustain the ordinance, which provides that "any county, city, etc., may make and enforce within its limits all such local police, sanitary, and other regulations *as are not in conflict with general laws.*" Also, the first clause of section 524, of the act of 1883, relating to cities, of the class in question, giving power "to pass ordinances *not in conflict with the constitution and laws of the state or of the United States.*" And section 530, authorizing the common council to define nuisances. (Laws 1883, pp. 211-214). But if the views presented are correct, this ordinance is not a "regulation," but a "destruction" of a lawful business, at the location selected for carrying it on, and does not fall within the police power of the state, and is "in conflict with general" and the supreme "law" of the land—the national constitution—and is not within any lawful power so conferred by either the state constitution, or statutes of the state.

In pursuance of the views expressed, the petitioner must be discharged, and it is so ordered.

WILLIAM BYBEE v. THE OREGON & CALIFORNIA RAILWAY COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

FEBRUARY 19, 1886.

1. GRANT TO THE O. & C. RY. CO. BY THE ACT OF 1866.—The grant of lands and the right of way to the O. & C. Ry. Co., by the act of July 25, 1866 (14 Stat. 239), and the act of June 25, 1868 (15 Stat. 80), construed to be:
 1. A grant of the odd sections of land within ten miles on each side of the line of the road, not otherwise appropriated or disposed of under the laws of the United States, prior to the definite location of said line, on condition that the road is completed by July 1, 1880, for a breach of which condition the grantor alone can claim a forfeiture.
 2. The grant of the

right of way is absolute, to take effect on the definite location of the line of the road from the passage of the act of 1866 as against any person claiming under a settlement or appropriation subsequent to the passage thereof without condition, save that which the law tacitly annexes to the grant of any such franchise, the liability to be lost or forfeited for non-user, ascertained and determined in a judicial proceeding, instituted by the government for that purpose.

2. *Idem*.—The declaration of section 8 of the act of 1866, that in case the road is not completed by the time prescribed—"this act shall be null and void"—taken in connection with the context, that the lands not patented to the company at the date of any such failure—"shall revert to the United States"—and the general purpose of the act and the policy of congress in passing it, amounts to nothing more than a declaration that the lands are granted on the condition that if the road is not completed in due time, the portion then remaining unpatented or unearned, may be reclaimed by the United States.

Before DEADY, District Judge.

Mr. Edward B. Watson and Mr. James F. Watson, for the plaintiff.

Mr. Earl C. Bronaugh, for the defendant.

DEADY, J. This action was brought in the circuit court of the state, for Jackson county, to recover damages for an alleged injury to a water ditch.

The defendant answered, denying sundry allegations in the complaint, and then set up a title or right of way in itself, over the *locus in quo*, under an act of congress, to which defense the plaintiff demurred.

Thereupon the cause was removed by the defendant to this court, as one arising under a law of the United States, where the question arising on the demurrer were argued by counsel.

It is alleged in the complaint, that the defendant is a corporation duly organized under the laws of Oregon; that on September 3, 1883, the plaintiff was the owner in fee of an undivided half interest in a certain water ditch and right, situated on the south side of Rogue river, in said county, and in the possession thereof, as tenant in common with Daniel Fisher, when he and said Fisher, in consideration of two hundred and fifty dollars paid them by the defendant, conveyed to it the right to enter on said ditch and construct and operate its railway over the same, on condition,

however, that it would not impair or obstruct the use or enjoyment of said ditch by said grantors; to which condition the defendant assented, and entered into possession of the premises in pursuance of said deed and subject to said condition; that notwithstanding, the defendant constructed its road across said ditch in such a manner as to permanently obstruct and destroy the same; and that the defendant has appropriated said ditch to its exclusive use, so as to prevent the flow of water therein where said road crosses the same, to the damage of plaintiff of seven thousand dollars.

It is stated in the defense in question, that the defendant was incorporated to construct and operate a railway and telegraph line from Portland to the southern boundary of the state; that by section 3 of the act of July 25, 1866 (14 Stat. 240), entitled "An act granting lands to aid in the construction of a railway and telegraph line from the Central Pacific railway in California, to Portland, Oregon," there was granted to the defendant the right of way through the public domain, to the extent of two hundred feet in width, wherever its road might be located on said lands; that the ditch at the point alleged to be injured, was located and dug, and is situated on the public domain, where, on July 25, 1866, the defendant, by virtue of the grant aforesaid, had the right to locate its road, in doing which and in constructing and operating the same, it became necessary for the defendant to appropriate two hundred feet in width of the land over which said ditch was located, and construct and operate its road thereon, and that any injury which was done to said ditch was the result of such construction and operation, and not otherwise; that on May 17, 1879, said Fisher attempted to appropriate the land in question to his use under the mining laws of the United States, and thereafter constructed said ditch over said "right of way land," which is the only claim said Fisher ever had or made thereto; and the plaintiff claims under said Fisher, and never had or made any other claim to the premises than the one so derived; and that the defendant took nothing by said deed from the plaintiff, for that, it then owned by virtue of said

grant, all the right and property pretended to be conveyed thereby.

The causes of demurrer assigned to this defense are: (1) It does not state facts sufficient to constitute a defense; (2) The plaintiff is estopped on the facts stated from claiming the right of way under said act of July 25, 1866; and (3) The defendant forfeited its right of way under said grant by its failure to complete its road over the same on or before July 1, 1875.

By section 2 of the act of 1866, there was granted to the defendant, to aid in the construction of its road, every alternate section of the public lands, designated by odd numbers, to the amount of ten such sections per mile, not otherwise disposed of by the United States, with the right to select from the odd sections within ten miles of each side of said grant, lands in lieu of any that may be so disposed of prior to the location of the line of said road.

And by section 3, there was granted to it the right of way over the public lands to the extent of one hundred feet on each side of the road, where the same may pass over said lands.

By sections 6 and 8 of said act, it is provided that unless "the whole" of the road is completed before July 1, 1875, the "act shall be null and void, and all the lands not conveyed by patent to said company," at the date of said failure, "shall revert to the United States." But by the act of June 25, 1868 (15 Stat. 80), the time for completing the road was extended to July 1, 1880.

It is no where directly stated that the road was not completed within the time prescribed by congress, but it is fairly inferable that such is the case, from the fact stated in the complaint, and not denied in the defense, that on September 3, 1883, the defendant took a deed from the plaintiff, giving the former the right to construct and operate its road, at a point between the termini thereof, across the ditch of the latter. And it is a matter of such common notoriety, that the road was not constructed south of Roseburg until after 1880, and it is not yet quite completed to the southern boundary of the state, that the court may well take judicial

1886.]

Opinion of the Court—Deady, J.

notice of the fact; and on the argument it was practically admitted.

This act is a present grant, but the particular sections that pass to the company under it, cannot be ascertained until the route is definitely located. But when ascertained, the title attaches from the date of the act. It is also a grant made on a condition subsequent—that the road shall be completed by a prescribed time. But no one can take advantage of a breach of this condition but the government—the grantor—and in the nature of things, it can only do so by judicial proceedings authorized by law, or a legislative resumption of the grant.

This well settled rule of law, concerning the operation of a condition subsequent annexed to an estate in lands in fee, and the effect of a breach thereof, has been uniformly applied by the supreme court to the grants of the public lands, made by congress in aid of the construction of railways, with the condition annexed, that they should be completed within a specified time. (*Railroad v. Smith*, 9 Wall. 97; *Schulenberg v. Harriman*, 21 Wall. 60; *Leavenworth Ry. Co. v. U. S.*, 92 U. S. 740; *Mo. Ry. Co. v. K. P. Ry. Co.*, 97 U. S. 496.

But counsel for the demurrer contend that the language of the act of 1866 is peculiar, and that by operation of section 8 the act becomes “null and void,” at once and *in toto*, whenever and as soon as there is a breach of the condition concerning the completion of the road.

But the general expression, “this act shall be null and void,” is qualified by the words immediately following. “and all the lands not conveyed by patent to said company, * * * at the date of any such failure, shall revert to the United States.” This shows how far and for what purpose the act would, in such contingency, become “null.” Certainly, it would not become “null” as to the lands already patented under it, or earned in pursuance of it. In other words, it is to become “null” only so far as to allow the grantor to resume the grant, on a failure to comply with the condition, and then only as to the lands remaining unpatented and unearned. And but for this qualification, the grant might have been wholly resumed or forfeited for any

failure to comply with the condition—even in the construction of the last mile. And this construction of the section is in harmony with the general purpose of the act and the policy of congress in making the grant.

In the leading case of *Schulenberg v. Harriman*, *supra*, the act making the grant did not, it is true, declare that the same shall become “null and void” on a failure to comply with the condition and complete the road. But it did provide what, in my judgment, is but the legal equivalent, in this respect, of section 8 of the act of 1866, namely: “If said road is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.” And so thereafter the act would cease to have any force or effect, and practically would be “null.”

Nor did the failure to complete the road by July 1, 1880, in any view of the matter, cause the act of 1866 to become “null” as to the right of way. The grant of the right of way is a separate and distinct matter from that of the lands to aid in the construction of the road. The reversion or forfeiture provided for in section 8 of the act of 1866, does not include the right of way, but is limited to the “lands” remaining unpatented or unearned, at the time of the failure. The grant of the right of way is without condition, except that which the law tacitly annexes to all such easements—the liability to be lost or forfeited for non-user, ascertained and determined in a judicial proceeding instituted by the government for that purpose. It is a present absolute grant, and takes effect when the line of the road is located from the date of the act, as against any intervening claim or settlement whatever. Whoever settled on or appropriated for any purpose, under any law of the United States, any portion of the public lands on the possible line of this road, after July 25, 1866, did so, subject to this grant of the right of way to this defendant.

It appears from the defense, that the plaintiff never was the owner of the land in question, but that it has been occupied or appropriated by him and those under whom he claims, since May, 1879, under the act of July 26, 1866 (14 Stat. 253), entitled “An act granting the right of way to

1886.]

Opinion of the Court—Deady, J.

ditch and canal owners over the public lands and for other purposes.”

But this occupation commenced long after the passage of the act granting the right of way over this land to the defendant, and is subordinate thereto. And this is so without reference to the fact that the act, under which the ditch was dug, is one day later in time than the other. For no one can claim any right, under that act, to any particular place or piece of ground prior to his occupation or appropriation of the same, thereunder.

The conclusion here reached in regard to the nature and effect of the grant of the right of way to defendant is fully sustained by the supreme court in *Ry. Co. v. Alling*, 99 U. S. 474, and *Ry. Co. v. Baldwin*, 103 U. S. 428. In the latter of these cases Mr. Justice Field suggested the reasons why grants of land, in aid of the construction of railways, have generally been made subject to the right of appropriation by individuals under the pre-emption and other like laws of the United States, between the date of the act making the grant and the fixing of the limits and operation of the grant by the definite location of the line of the road; while those of the mere right of way have been made absolute and to take effect from the passage of the act, as against any location claim or settlement made after the date of the grant and before the definite location of such right.

He says “The grant of the right of way * * * contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby. The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles

would be often imposed to the progress of the road. For any loss of lands by settlement reservation, other lands are given, but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route."

In the construction of this ditch on the possible line of the defendant's right of way from Portland to the southern boundary of the state, the parties engaged therein took the risk that such line might be located on, along or across the same, in which case their right under the ditch and canal act of 1886 must so far yield to the prior and better right of the defendant under the railway act of the same year. (*Doran v. Central Pacific Ry. Co.*, 24 Cal. 259.)

In this case the court say: "The grant by congress of the right of way over any portion of the public land to which the United States have title, and to which private rights have not been attached under the laws of congress, vests in the grantee the full and complete right of entry for the purpose of enjoying the right granted, and no person claiming in his own right any interest in the lands can prevent the grantee from entering, in pursuance of his grant, or can recover damages, that may necessarily be occasioned by such entry."

But the plaintiff contends that the defendant is estopped by the acceptance of the deed of September 3, 1883, from asserting its prior title to the premises under the act of 1866, granting it the right of way over the same.

It is a well established rule of law that ordinarily a vendee is under no obligation to support his vendor's title, and therefore he is not estopped to deny the same, except in a few cases where his conduct in so doing would be repugnant to his acceptance of the grantor's deed, or a claim made under it. (*Society, etc., v. Pawlet*, 4 Pet. 506; *Blight v. Rochester*, 7 Whea. 547; *Croxall v. Sherred*, 5 Wall. 287; *Merryman v. Bourne*, 9 Wall. 600; *Sparrow v. Kingman*, 1 Com. 242; *Coakley v. Penny*, 3 Ohio St. 344; *Stark v. Starr*, 1 Sawy. 24; *Bigelow on Estoppel*, 294.)

This is a peculiar case, and my attention has not been called to one that is its exact parallel.

At the date of his deed the plaintiff's ditch was construct-

1886.]

Opinion of the Court—Dedy, J.

ed along and across the premises, but the legal right to the use and possession thereof for the purpose of its incorporation was in the defendant. From the date of the definite location of the line of the defendant's road, the plaintiff had no right or easement to or in the land within the defendant's right of way, and was to all intents and purposes, a naked trespasser thereon. He therefore had nothing to sell or convey to the defendant. His possession, if any, was merely constructive. Under these circumstances, the parties apparently supposing that the plaintiff had acquired some right to flow the water over the premises, the defendant purchased the privilege of constructing and operating its road across and along the ditch for two hundred and fifty dollars, and on the further condition that it would not thereby obstruct or impair the same.

But the condition of the covenant being incident to and dependent on the conveyance of some right in the premises to the defendant, if the latter is at liberty to show that nothing passed by such conveyance, the condition or covenant is left without consideration or support, and falls to the ground. And if there is any good reason in law or justice, notwithstanding the want of title in the plaintiff, that the defendant should keep this condition or covenant, it will be estopped to show a want of consideration from the plaintiff.

The plaintiff has really parted with nothing, nor has the defendant obtained anything from him, although it has paid the plaintiff \$250. The ditch was dug on what turned out to be the defendant's right of way land, and the plaintiff in consenting to allow it to construct and operate its road thereon, surrendered nothing to which it had any legal right. The conveyance was altogether an idle and superfluous act, and whatever misapprehension of the parties, as to their rights in the premises, may have induced it, in legal effect it is a mere nullity.

The case of *Holden v. Andrews*, 38 Cal. 119, is somewhat analogous.

Holden being in possession of a tract of the public lands, sold or abandoned the same to Andrews for a specified sum, to be paid in the future. Andrews failed to pay and Holden

Opinion of the Court—Deady, J.

[February,

brought an action to recover the possession of the land in which he had judgment. On the trial the defendant offered to prove that since the sale he had acquired the title from the United States under the homestead law, which was not allowed, on the ground that he was estopped from setting up the afteracquired title from the United States without first surrendering the possession obtained by the purchase from the plaintiff. On appeal the judgment was reversed and a new trial ordered. The opinion of the court was delivered by Mr. Justice Sawyer, who said: "We think this is not a case that falls within the rule. The plaintiff did not pretend to have any other title than by naked possession."

In *Coakley v. Penny*, *supra* 347, the court says: "The decisions in this country, in which the grantee and those claiming under him, were held to be estopped to deny the title of the grantor, were cases in which the grantee received and held possession under the conveyance, and relied upon it as his source of title, and not where the grantee held the title under a prior and independent conveyance."

Here the defendant derived nothing from the plaintiff, and does not rely on his conveyance as a source of title, but does rely on a title derived from the United States prior to such conveyance.

On the whole, my judgment is, that this case is not an exception to the rule, which allows a vendee to deny his grantor's title. And from the facts stated in this defense it clearly appears that the defendant took nothing by the conveyance from the plaintiff, and is therefore not bound to keep the condition or covenant therein, concerning the plaintiff's ditch.

The demurrer must be overruled; and it is so ordered.

1886.]

Statement of Facts.

WATERMAN v. WATERMAN.

SAME v. PORTER.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MARCH 1, 1886.

1. **VENDOR AND VENDEE—CONTRACT—CONSIDERATION—WRITTEN CONTRACT.**—The real consideration for a contract to convey may be shown, although the contract states only a nominal one.
2. **CONTRACT—ADEQUACY OF CONSIDERATION—EVIDENCE.**—Where a party advances several thousand dollars to develop certain silver mines, in consideration of which he is to be repaid out of their first product, and receive in addition an undivided fractional part of the mines: *Held*, that the contract cannot be avoided on the ground that the consideration was inadequate.
3. **SAME—UNCERTAINTY—HARDSHIP.**—On the same state of facts: *Held*, that the contract cannot be avoided on the ground that the property to be conveyed is uncertain, or that the performance of the contract would work hardship.
4. **SAME—MUTUALITY—OPTION.**—In an action on a contract, want of mutuality cannot be set up as a defense by the party who has received the benefit, simply because it was left optional with the other party as to whether he would enforce his right.
5. **SAME—SECURITY—EVIDENCE.**—Evidence considered, and *Held* not to sustain the position that the contract to convey was given simply as security for the money advanced.

Before SAWYER, Circuit Judge.

IN EQUITY.

The actions referred to in the following opinion were brought by the complainant as the assignee of her deceased husband, to compel the specific performance of certain contracts in writing entered into with him by the defendants. One of the contracts was as follows:

“SAN BERNARDINO, May 14, 1881.

“For and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby agree that, at any time within twelve months from this date, upon demand of J. S. Waterman, or his heirs, administrators, or assigns, I will execute to him a good and sufficient deed of conveyance to an undivided twenty-four hundredths (24-100) of the following mines, known as the Alpha,

Opinion of the Court—Sawyer, C. J.

[March,

Omega, Silver, Glance, and Front, each being six hundred feet front by fifteen hundred feet long; and the same interest in all the lands that may be located, or have been located, for the development of the above mines; with such machinery and improvements as are to be placed upon the same,—all subject to the same proportion of expenses, which is to be paid out of the development of the above property; all situated near the Grape Vine, in the County of San Bernardino, State of California.

(Signed)

R. W. WATERMAN."

The other contract was of a similar character, but was signed by G. L. Porter, who agreed therein to convey, on demand, to J. S. Waterman, three one-hundredths of the same mines. The other facts are sufficiently stated in the opinion of the court.

SAWYER, Circuit Judge, orally. This case of Waterman against Waterman, is a suit in equity to compel the specific performance of a contract to convey portions of the silver mines described in the bill of complaint. I have gone through the record very carefully. The testimony is very voluminous, and the principal questions are questions of fact. It would be unprofitable to enter into a long discussion of the evidence, and I shall only announce my conclusions in the matter.

In my judgment the plaintiffs are entitled to a decree for the conveyance of the property, and for a reference to take an account of the profits of the undivided portion of which a conveyance is sought.

The legal points made by the defendants are, briefly: first, insufficiency of consideration. The consideration in the written agreement of conveyance mentioned is one dollar. If the parties agree to sell for one dollar, I do not see that any body has a right to complain. On the face of the bill, and certainly upon the testimony, there is nothing to justify a holding that the consideration, expressed or real, was inadequate. If the amount expressed is adequate for a deed of conveyance, it certainly ought to be adequate to sustain a contract to convey. Besides, it appears that that was not the real consideration at all. The failure to state

1886.]

Opinion of the Court—Sawyer, C. J.

the full consideration makes no difference. The parties took up a mining claim, had it partially prospected, and being impecunious, had no means to develop the mine and procure machinery. They entered into an agreement by which another party was to furnish the money, and they gave a contract to convey a part of the property, and besides agreed to pay the money back out of the first proceeds of the mine. The capitalist, J. S. Waterman, advanced in all something over twenty-six thousand dollars, and, in addition to that his brother, R. W. Waterman, who was one of the parties, received a remission of all the indebtedness due from him to J. S., which was about eleven thousand dollars; and that, with three thousand five hundred dollars to pay private indebtedness, was the real consideration for the contract. J. S. Waterman did not choose to take a conveyance at the time, for the reason that he did not wish to put himself in the position of a partner. This was substantially, *on his side*, an option. For the development of the mine, he was willing to furnish the funds and take that risk for a share of the mine, in case it should prove valuable, but he was not willing to assume any indebtedness that a mining partnership might incur. I think there is no insufficiency of consideration.

The next point is the uncertainty of the property conveyed, and the hardship of performance. I do not think it is uncertain,—the property being mines, well known by name, and necessarily described in the records of the claims,—nor do I think it would be a hardship to enforce the contract. The names and records furnish the means of sufficient identification. There is no hardship about it. It would be a great hardship to the other party if it should not be enforced. The party who advanced the money, and who was entitled to receive the conveyance, is the one who took all the risk. He had everything to lose and nothing to gain, on the theory set up by the defendant, while the other side had every thing to gain and nothing to lose. The hardship would be directly the other way. It was complainant's assignor's money that was invested, and it was his money that secured the mines. If it turns out that the mines are val-

Opinion of the Court—Sawyer, C. J.

[March,

uable, and that the conveyance would be valuable to him, the result is still more valuable to defendants.

The next defense set up is want of mutuality. You might as well say that there was a want of mutuality in a promissory note, and that a payee could not recover because he could not be compelled to take the money. If the obligors chose to give him this option, and to receive the large consideration of twenty-six thousand dollars, which was to be paid back only out of the first products of the mine, besides a large indebtedness which he was not to receive back at all,—if they were satisfied to give him this option, I do not think they can complain if he should choose to accept the option when it turned out to his advantage to do so, even if he was anxious to know the extent of his ability, and to refuse to give authority to them, on the other side, to run him into debt to an unlimited extent. I do not perceive why he could not make the agreement with the consent of the other parties, and why it should not bind the other parties when made. He gave an ample consideration. Whatever effect this might have upon the rights of creditors is outside of the present question. The defendants agreed to it, and it was sufficient as to them.

Other defenses are pleaded, which I do not think are sustained by the evidence. One is that this contract was only given as security. Manifestly it was not intended for any such purpose. If it was security, the security would be no better with, than without it, because the money was to be paid only out of the mine, in any event; and if the mine did not produce the money, it would not be paid, and it would have little value as security. Besides, he absolutely gave up an indebtedness not to be returned or secured. That claim as to security was never made until set up in the answer. Even when the complainant first wrote to defendants to demand a conveyance, they did not set up security at all as a ground of defense. The ground relied on then by defendant, Waterman, was, that his brother only took it, so that, in case it ever came to him, he could give it to defendant's own children. I do not think the testimony is sufficient to justify the court in coming to that conclusion. Evidently the de-

1886.]

Points decided.

ceased, James S. Waterman, to whom the contract was given, did not act upon that supposition; neither is there any evidence that any of these parties did, until after his death, nor even till the conveyance was demanded. I shall, therefore, order a decree, in pursuance of the prayer of the bill, for conveyance of the property, and that it be referred to the Master to ascertain the profits that have been made.

The other case against Porter is for the same thing, except for a smaller amount. Waterman agrees to convey twenty-four hundredths and Porter three hundredths of the mine. The only defense that Porter sets up is that it was merely as security. Manifestly he did not set that up in response to the demand of the complainant for a conveyance. He seemed at that time to recognize the liability, by implication at least, but was not certain to whom the conveyance should be made. He thought that the family should first settle their affairs before he was called upon to convey; but, briefly, the defense stands upon the same footing as in the other case. These parties all obtained assistance from the deceased, and assignor of the complainant here; and through his aid, and at his risk, secured mines that turned out to be valuable, one of them now having one-half and the other nearly one-quarter. Justice requires that they convey the small part so richly earned, and which the defendants agreed to convey.

I am satisfied, from the testimony, that the same decree should be made in this case that was made in the other.

THE DIRECTOR—ALEXANDER BALFOUR, ET AL., LIBELLANTS.

DISTRICT COURT, DISTRICT OF OREGON.

MARCH 5, 1886.

1. JOINDER OF CAUSES OF ACTION IN REM AND PERSONAM.—The admiralty rules from 12 to 20, inclusive, relating to joinder of causes of action do not apply to cases not therein enumerated; but the same, under rule 46, may be proceeded with, in this respect, in such manner as the court may deem expedient for the administration of justice.
2. SUIT ON A CHARTER PARTY.—In a suit by a shipper for the non-performance of a contract of affreightment, the facts which establish the liability

Opinion of the Court—Deady, J.

[March,

of the master, also give the libellant a lien on the vessel for the amount of his claim, and therefore it is proper and expedient that the proceeding against the owner or the master and the vessel should be joined in one libel.

3. **REPLEVIN IN ADMIRALTY.**—When the possession of personal property has been changed by means involving the breach of a maritime contract concerning the same, or such possession is wrongfully withheld contrary thereto, the owner or other person entitled, under the circumstances, to the possession thereof, may maintain a suit in admiralty to obtain the same.
4. **DAMAGES—GENERAL AND SPECIAL.**—Damages that are not the necessary result of the act complained of, and therefore not implied by law, are special, and the facts constituting them must be particularly stated in the libel.

Before DEADY, District Judge.

Mr. C. E. S. Wood and Mr. John W. Whalley for the libellants.

Mr. Thomas N. Strong for the claimant.

DEADY, J. This suit was brought by the libellants, Alexander Balfour, Stephen Williamson, Robert Balfour, Alexander Guthrie and Robert B. Foreman, doing business in this port as Balfour, Guthrie & Co., on November 22, 1885, to recover the possession of sixteen thousand eight hundred and sixty-eight bags of wheat, weighing nine hundred and eighty-five thousand four hundred and eighty-four pounds; and four thousand six hundred dollars damages for the non-fulfillment of a contract of affreightment thereabout.

On reading and filing the libel, an order was made thereon, allowing process to issue as prayed for therein, on which the vessel and wheat were subsequently arrested.

On January 4th, the master, William D. Bogart, filed a claim of ownership for William W. Trombull.

The case was argued and submitted on exceptions to the libel.

From the latter it appears that on October 3, 1885, William D. Bogart, master of the British bark *Director*, then lying at this port, made a charter party with W. J. Burns, the local agent of the libellants, whereby he contracted to carry on said vessel, at forty-two shillings and six pence a ton, a cargo of wheat to a port in the United Kingdom; that

1886.]

Opinion of the Court—Deady, J.

between said date and October 8th, said vessel was laden by the libellants with the wheat aforesaid, consigned to their own order, for which the master signed two bills of lading, one of which was delivered to the libellants, and on November 14, remailed by them to said agent for return to said master; that in and by said charter party it was expressly agreed that said vessel was "tight, staunch, strong and in every way fitted for such voyage," when in fact she was so unseaworthy that as soon as the cargo was on board she commenced to leak so badly she could not proceed on her voyage, and her cargo was discharged; that said vessel had been in a leaky and unseaworthy condition on her voyage from Hong Kong to this port, and prior thereto, during which she made water at the rate of three inches an hour, until relieved of her cargo in the Columbia river and at Portland, when the leak became immaterial; that said leak was caused by an inherent defect and unseaworthiness of said vessel, all of which was well known to said master at the date of said charter party and long prior thereto, and was then fraudulently concealed from the libellants by said master, and afterwards, while the vessel was loading, by preventing the working of her pumps otherwise than secretly between nine P.M. and midnight; that by reason of said false warranty the "libellants have lost a sale" of said wheat, negotiated and contracted in London on October 5, 1885, "whereby they are damaged in the sum of four thousand dollars; and also by the loss of one hundred dollars, the premium paid on marine insurance on said wheat while on board and five hundred dollars of expenditures contingent on the transaction."

The prayer of the libel is for due process against the vessel and the wheat; to the end, that the former may be condemned and sold to pay said damages, with interest and costs of suit, and the latter delivered to the libellants free of charges or liens; and that the master be cited to appear and answer the libel, and the charter be annulled and declared void from the beginning.

The exceptions to the libel are to the effect: (1) It "misjoins" a suit *in rem* against the vessel with a suit *in perso-*

Opinion of the Court—Dedy, J.

[March,

nam against the master; (2) It “misjoins” a cause of suit for a breach of the warranty in the charter and to avoid the same on account of the fraud of the master; (3) It does not show that the libellants are the owners of the wheat, or what, if any, interest or claim they have therein or there-to; and (4) The allegation in article 11 concerning the sale of the wheat is uncertain and insufficient.

As preliminary to the consideration of the questions made by these exceptions, it may be premised that in the absence of the owner or of his special representative, the master of the Director was authorized to make this charter party, and to contract, as he did, for the carriage of this wheat and the fitness of the vessel for the service. The transaction was within the scope of his ordinary power, as master, while engaged in the navigation of the vessel in a foreign port, and the vessel and owner are each liable for his fraud or misconduct in making said contract or the failure to perform the same. (*The Zenobia*, Abb. Ad. R. 48; *U. S. v. Malek Adhel*, 2 How. 234; *Hurry v. Hurry*, 2 Wash. 149; *Ward v. Green*, 6 Cow. 175; *The Tribune*, 3 Sum. 149; 1 Par. A. & S. 276, note 3; 2 Id. 8, 10, 12.)

But it must be understood that the vessel is not liable for a breach of a contract of affreightment, so long as it is wholly executory, though the master and owner are. (*The Ira Chaffee*, 2 Fed. Rep. 401.) But as soon as the performance of the contract is commenced, a lien exists on the vessel in favor of the shipper or charterer, and a suit *in rem* may be maintained against the same for any liability of the master or owner arising on or growing out of such contract. (*The Hermitage*, 4 Blatch. 475; *The Monte A*, 12 Fed. R. 332; *The Keokuk*, 9 Wall. 519; *The Zenobia*, Abb. Ad. R. 80; *The Windermere*, 2 Fed. Rep. 722.)

In this case the performance of the contract had commenced by the lading of the cargo, and the master, owner and vessel are each liable thereon. Such being the case, can the libellant pursue his remedy against the vessel and the master, the one being *in rem* and the other *in personam*, in one suit?

The point has been contested in the American courts.

1886.]

Opinion of the Court—Deady, J.

And yet, but for a *dictum* of Mr. Justice Story's in the case of *The Citizens' Bank v. The N. S. Company* (2 Story, 57), I do not think there would be any question about it.

That suit, which was brought against the company as a common carrier, was decided in its favor, on the ground that the carriage of bank bills was not within the scope of its ordinary employment, and therefore it was not liable on the master's undertaking in respect to the same. To which Mr. Justice Story added: "In the course of the argument it was intimated that, in libels of this sort, the proceedings might be properly instituted both *in rem* against the steamboat, and *in personam* against the owners and master thereof. I ventured at that time to say that I knew of no principle of authority, in the general jurisprudence of the courts of admiralty, which would justify such a joinder of proceedings, so very different in their nature and character and decretal effect."

It is said that Homer sometimes nods; and taking this instance as an illustration, I think the same may be said of the learned and enlightened jurist who did so much in his day to establish and maintain the admiralty jurisdiction of the American courts, unhampered by the arbitrary restrictions once imposed thereon, in England, by the jealousy of the common law courts and lawyers, and to formulate for them a comprehensive and convenient rule of procedure.

In a suit for a breach of a charter party or contract of affreightment, whether brought against the master, owner or vessel, there is no substantial difference, either in allegation, proof or decree. The liability in either case grows out of the same facts, and the relief sought and obtainable is the same. The only difference is in the enforcement of the decree, and that is merely a difference in degree—the enforcement of the one given in the suit *in rem*, being in the nature of things, limited to the sale of the vessel proceeded against, whilst the one in the suit *in personam* may be enforced by an execution against the property of the defendant generally.

This being so, every argument founded on convenience and economy is in favor of their joinder in one suit.

Opinion of the Court—Deady, J.

[March,

In the consideration of this question, in the *Clatsop Chief* (7 Sawy. 274), I said: "My own impression of the matter is with Mr. Benedict, when he says (Ben. Ad., section 397), 'that whenever the libellant's cause of action gives him a lien or privilege against the thing, and a full personal right against the owner, then he may, by a libel properly framed, proceed against the person and the thing, and compel the owner to come in and to submit to the decree of the court against him personally in the same suit, for any possible deficiency.'

It is a question, simply of procedure, and should be determined mainly, if not altogether, upon consideration of fitness and convenience; and every argument drawn from this source is in favor of the joinder of the remedies *in rem* and *in personam*, whoever the person may be, and pursuing them in one libel, as one suit."

By the admiralty rules, from 12 to 20 inclusive, adopted by the supreme court in 1845, and since the decision of the case of the *Citizens Bank v. The N. S. Company*, *supra*, this subject is regulated in some of its phases, but not in the case of a suit for a breach of a charter party or contract of affreightment. By these, in the case of a suit for wages, pilotage or damage by collision, the libellant may proceed against the ship and master. The mode of proceeding allowed by these rules is considered to be exclusive of any other in the cases to which they apply. (*The Richard Doane*, 2 Ben. 112). But under admiralty rule 46, this court may proceed in all other cases in this respect according to such rule as may be deemed most expedient for the due administration of justice.

Under this authority, the district courts have generally assumed that it is not only expedient, but according to the general rule of admiralty procedure, in a cause upon a contract of affreightment, to proceed against the master and the vessel in one suit; and, as I have already said, in my judgment, there is no doubt of the propriety and legality of so doing. (*The Monte A*, 12 Fed. Rep. 336; *The Zenobia*, Abb. Ad. R. 52; *Vaughan v. 630 Casks of Sherry Wine et al.*, 7 Ben. 507).

1886.]

Opinion of the Court—Deady, J.

In the latter case the suit was brought on a bill of lading against the goods and the consignee thereof, to recover the freight thereon. The libel was excepted to on account of the joinder of the causes of action against the *res* and the person. Mr. Justice Blatchford, in disposing of the exception, says: "This exception is overruled. The cause of action arises out of a contract which, if the respondents are liable on it, also binds the property. There is no good reason for not joining the causes of action."

The second exception is not well taken. If a court of admiralty has jurisdiction of a suit to declare this charter partly void for the fraud of the master leading to and inducing its execution by the libellants or charterer, the joinder in such suit of a claim for damages on account of such fraud does not appear to be improper; but if it has not such jurisdiction then the prayer for relief against such charter party by having it declared void *ab initio*, should have been excepted to alone, and on that ground.

The third exception is also disallowed.

The right to maintain a suit in admiralty for the possession of this wheat is not challenged by this exception. But the point made thereby is, that it does not appear that the libellants have such an interest in the property as entitles them to maintain such suit at all.

When the possession of personal property has been changed by means involving a breach of a maritime contract concerning the same, or such possession is wrongfully withheld contrary thereto, the owner or other person, entitled, under the circumstances, to the possession thereof, may maintain a suit in admiralty to obtain the same. (528 *pieces of Mahogany*, 2 Low. 323, and cases there cited; 1 Kent, 379).

Upon the facts stated, the libellants, as against the vessel and the master, are entitled to the possession of the wheat, and may maintain an action to recover the possession of the same. True, it is not alleged in so many words that the libellants are the owners of the wheat, though such is the fair inference from the facts stated. Nor is such an allegation necessary. It does appear that the libellants had the possession and control of the wheat and placed it on board

Opinion of the Court—Deady, J.

[March,

the Director, for carriage to Europe, on their own account, under the stipulations of the charter party, and that the master, in violation thereof, has discharged the same on the dock in this port. Except under special circumstances, a carrier is not allowed to dispute the title of the person who delivers goods to him for transportation. (*Rounfield v. The Express Company*, 1 Wood, 131). In Benedict's Admiralty (p. 476), a precedent is given of a libel *in rem* against certain merchandise, by the consignee thereof, for the possession of the same, that was withheld by the master of the vessel on which it was brought from Liverpool to New York, on a disputed claim for average contribution. It is not alleged that any one owned the merchandise in question, but only that it was shipped by John Brown, of Liverpool, and consigned to the libellant.

The master of the Director is not at liberty to question the libellants' right to the possession of this grain contrary to or outside of the stipulations of the charter party. *Prima facie*, they are the owners of it and entitled to maintain an action to regain the possession thereof, which they appear to have parted with on the faith of the master's representation that his vessel was "tight, staunch and strong and in every way fitted" for the voyage she was about to undertake, when in fact she was not, and he knew it.

This proceeding is, in substance, the same as the common law action of replevin. A special property in the goods in question is sufficient to enable the plaintiff to maintain that action against any one but the general owner. (*Chitty's P.*, 187; *Dillenbach v. Jerome*, 7 Cow. 300, note; *Smith v. James*, Id., 328; *Portland Bank v. Stables*, 6 Mass. 426.)

In the latter case the court held that the consignee of a cargo of salt shipped at Liverpool for Boston might maintain replevin against the master for the same at Portland, Me., on the refusal of the latter to proceed to Boston with the salt, or deliver it to the consignee at Portland.

The fourth exception is taken to so much of the eleventh article of the libel as alleges that by reason of the premises, the "libellants have lost a sale of the aforesaid cargo, negotiated and contracted in London, October 5, 1885," to

1886.]

Points decided.

their damage four thousand dollars. This is not a statement of general damages suffered by the libellants on account of the failure to carry the wheat according to contract, but an attempt to state a case of special damages arising therefrom. And considered in this light, I think it is clearly insufficient. For instance, the loss of this sale did not necessarily damage the libellants. That depends on circumstances concerning which the libel is silent, such as the subsequent rise or fall of the market. And if they were injured at all by the loss of the sale, there are no facts stated showing or tending to show how they were injured or the amount of the damages.

In order to prevent surprise to the adverse party, special damages, or such as are not the necessary consequence of the act complained of and are not therefore implied by law, must be particularly stated. (1 Chit. P. 440-444; *Squier v. Gould*, 14 Wend. 160; *Stevenson v. Smith*, 28 Cal. 103.)

This exception is allowed.

THE DUNDEE MORTGAGE & TRUST INVESTMENT COMPANY v.

D. M. COOPER ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 12, 1886.

1. **PROOF OF FOREIGN STATUTE.**—The testimony of a credible witness, whether a lawyer or a layman, with reasonable means of information, to the effect that a volume containing what purports to be a statute of a foreign country is commonly received in the business and courts of such country, as such, is competent and sufficient proof of the existence of such statute.
2. **CERTIFICATE OF INCORPORATION.**—A certificate of incorporation under section 18 of "The Companies Act" of Great Britain, may be issued in duplicate and at any length of time after the memorandum of association is registered in the office of the registrar.
3. **IDEM—PROOF OF.**—Such certificate when delivered to the corporation is a private writing in private custody, and cannot be proved by an examined copy; the original must be produced if in existence.

Before DEADY, District Judge.

Mr. Earl C. Bronnaugh, for the plaintiff.

Mr. Ellis G. Hughes, for the defendants.

DEADY, J. This suit is brought to enforce the lien of a mortgage, given to secure the payment of a note for ten thousand dollars, with interest.

It was commenced on October 28, 1884, in the state circuit court for the county of Linn. On March 12th the defendants, D. M. Cooper and Rebecca, his wife, J. H. Wilson and Mary, his wife, J. M. Wilson and Matilda, his wife, answered the complaint, denying the corporate existence of the plaintiff, whereupon the latter, on April 7th, removed the cause into this court, where the same was heard on February 3, 1886, on the complaint, answer, evidence and exhibits.

On the hearing the point was made that the answer should have been replied to, and the court, without passing on the question, allowed the plaintiff to file a replication thereto, *nunc pro tunc*, which was done on February 5th.

It is alleged in the complaint that the plaintiff is a corporation duly organized under the laws of Great Britain, with its principal office at Dundee, Scotland; that on April 14, 1881, the Oregon and Washington Mortgage Savings bank, a corporation also duly organized under the laws aforesaid, loaned to the defendant, D. M. Cooper, the sum of ten thousand dollars, for which he made and delivered to said corporation his promissory note, payable to its order, on December 1, 1885; and also five other notes, payable to its order, on December 1, 1881, 1882, 1883, 1884 and 1885, respectively, for the several amounts of interest payable on said loan at said dates, at the rate of ten per centum per annum, amounting in the aggregate to fourteen thousand six hundred and thirty-two dollars and ninety cents, and at the same time, together with the defendant, Rebecca, his wife, executed and delivered to said corporation a mortgage of sundry parcels of land in said county of Linn, as a security for the payment of said notes, which was duly recorded on June 9, 1881; that on May 15, 1882, the defendants, D. M. Cooper and Rebecca, his wife, conveyed said land to the defendant, J. H. Wilson, in part consideration whereof the latter assumed and agreed to pay the notes aforesaid; that on February 23, 1883, said Oregon and Washington Mort-

1886.]

Opinion of the Court—Deady, J.

gage Savings bank, for value received, assigned said notes and mortgage to the plaintiff herein, who is now the owner of the same; that said defendants, Cooper and Wilson, have not paid said notes or any one or part thereof, and therefore the plaintiff, pursuant to a provision in said mortgage, now declares the whole of the principal sum of said loan and the interest accrued thereon to be presently due; that by the terms of said mortgage it is also provided that in case a suit is required to be brought to enforce the lien of the same, that there shall be taxed in favor of the plaintiff therein an attorney fee of ten per centum on the amount due on said notes; that the defendants, George E. Chamberlain, W. E. Edwards, N. Whealdon, J. M. Wilson and Matilda, his wife, have some interest in or lien on the premises, subsequent to the mortgage aforesaid, the nature of value of which is unknown to the plaintiff.

The complaint prays for a decree against D. M. Cooper and J. H. Wilson for the sum of twelve thousand six hundred and thirty-two dollars and ninety cents and one thousand dollars attorney fee, together with costs and disbursements, and in default of payment thereof, for the sale of the premises to satisfy the same.

The defendants, D. M. Cooper and J. H. Wilson, having contracted with the Oregon and Washington M. S. bank, as a corporation, concerning the payment of this money, are estopped thereby to deny its corporate existence or power to make such contract. (*Oregonian Ry. Co. v. The Oregon R. & N. Co.*, 10 Sawy., 470; A. & A. on Cor. (9th Ed.), 640.) But as to the assignee of such corporation, the plaintiff, the case is otherwise.

The plea or answer of the defendant purports to be in abatement. A denial of the corporate existence of a corporation not only controverts its right to sue, but also the cause of action. However, it seems that a party may, if he will, plead such non-existence in abatement only. (*The Oregonian Ry. Co. v. The Oregon R. & N. Co.*, 10 Sawy. 469.)

This plea or answer consists simply of a denial of the allegation in the complaint, that the plaintiff is a corpora-

tion duly organized under the laws of Great Britain. In effect it is the old plea of *nul tiel* corporation.

In the provisions of the code, under which these pleadings were made, this affirmative and negative allegation make an issue. Together they constitute a fact, affirmed on the one side and denied on the other. There is no new matter in the answer, and therefore there is nothing really to reply to. Nevertheless, it seems, that at common law, the analagous plea of *nul tiel* record requires a replication to put the matter formally in issue. (1 Chitty's P., 632.) And in equity, it seems that the matter in a plea, whether negative or affirmative, is put in issue by a replication thereto. (Story's E. P. sec. 697.) This anomaly could and should be cured by a rule of the supreme court, dispensing with a replication to a plea, unless and only so far as it contains new matter.

Upon the evidence taken on the plea two questions arise: (1) Is the proof of the law of Great Britain, under which it is claimed the plaintiff was incorporated, sufficient; and (2), is the proof of the incorporation thereunder also sufficient?

The only witnesses examined as to the law are William Mackenzie and Hugh Roger. The former is a resident of Dundee, Scotland, a stockbroker, and the secretary of the plaintiff from the time of its organization. The latter is the resident agent of the plaintiff in Portland for the past three years. But he is a native of Scotland, and resided there until he came here, during which time he was engaged as an accountant for six years in Edinburgh, in the management of corporations organized under the law of Great Britain and with the winding-up of the same, under the supervision of the court of sessions, the highest court in Scotland.

They both testify that exhibit A, a bound volume of statutes, purporting to be the acts of the parliament of Great Britain on the subject of "the incorporation, regulation and winding-up of trading companies and other associations," including the act cited as "The Companies Act, 1862," and sundry amendments thereto, made in the years

1886.]

Opinion of the Court—Deady, J.

following and as late as 1883, is published by William Blackwood & Sons, the queen's printer, in Scotland, under license from the government, and is commonly received in Scotland as an authoritative copy thereof; and Mr. Rogers says that copies of this publication are universally received by all professional men and all courts in Scotland as official, and there are no other official copies of the companies Act in use there; and that the book is generally received in Scotland as published by authority of a license from the government issued by the lord advocate for the time being.

On the first page of the book there is an imprint of the royal arms and the title—

“Anno vicesimo quinto & vicesimo sexto *Victoriæ Reginæ*,
Cap. LXXXIX.

An act for the incorporation, regulation, and winding-up of trading companies and other associations—(7th August, 1862.)”

Then follows the act—the enacting clause being to the effect, that the same is enacted by the queen with the advice and consent of the lords and commons in parliament assembled—the first section thereof, providing that it may be cited, as “The Companies Act, 1862.”

In *Ennis v. Smith*, 14 How., 426, the supreme court say, that there is no general rule prescribing the mode of authenticating a foreign statute, but that it “may be verified by an oath or by an exemplification of a copy, under the great seal of the state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer, properly authorized by law, to give the copy, which certificate must be duly proved. But such modes of procedure as have been mentioned, are not to be considered exclusive of others, especially of *codes of laws* and accepted histories of the law of a country.”

In that case, the court held that a copy of the French civil code was sufficiently proved, when it bore the imprint of the French royal press, and was received in exchange between the two countries, with the endorsement: “*Les Garde des Sceaux de France a la Cour Supreme des Etats Unis.*”

By the code of civil procedure of this state (sec. 733, sub. 4), it is provided that "the proceedings of the legislature of a foreign country" may be proved "by journals, statutes or resolutions published by their authority respectively or *commonly received in that country as such.*"
* * *

The argument of counsel for the defendant assumes that a foreign statute, unless shown by a sworn or certified copy of the original, can only be proved by the testimony of an expert, who, from personal familiarity with the subject, is able to state from memory the exact provisions of the act and the accepted interpretation of in the place of its enactment.

But this is altogether too narrow and impracticable a view of the subject.

Both the common or customary and the statute law of a foreign country may be shown by books of acknowledged or proven reputation or credit therein. In this age of printing and publication, the law is no longer locked up in the breast of the human oracle, but is deposited in unsealed volumes, where it can be known and read of all men. The testimony of a credible witness having ordinary means of information, that a certain publication is commonly received as a true copy of a statute, in the country of its enactment, is better and more satisfactory evidence of the existence of the statute than the testimony of any expert, speaking from memory alone.

In the case of *The Pawashick* (2 Lowell, 142), Mr. Justice Lowell examines this subject with his usual care and good sense. The opinion contains many valuable and timely suggestions on the subject. In the course of it (p. 146), he says:

"The relations which we hold to England in the common origin of our laws, a similar mode of legal reasoning, the habit of studying and citing the English cases, the common language and frequent intercourse between the two countries, render it safe and proper to adopt a similar practice with respect to the laws of that country, that the states of this Union have generally found it expedient to carry out

1886.]

Opinion of the Court—Deady, J.

in relation to each other. It was soon found in trials in the United States that the danger of mistaking the laws of the other states was, on the whole, a less evil than the danger of injustice and delay, if the strict proof were required in every case. In consequence of this discovery, many of the states have passed laws admitting the printed statutes and books of reports of sister states to be read in evidence. (See Story, Conf. Laws, Redf. ed. sec. 641 a). But before these statutes were passed, or without their aid, the courts of some states have taken this step for themselves. (*Thompson v. Musser*, 1 Dallas, 458; *Raynham v. Canton*, 3 Pick. 293; *Young v. Templeton*, 4 La. Ann. 254; *Lord v. Staples*, 3 Foster, 448). In two of these cases a query was made whether foreign statutes, strictly so-called, could be proved by printed copies only, even with evidence tending to show the authenticity of the copies. But such statutes have been received in two cases, in which it was merely proved that they were bought of the public printer. (*Jones v. Moffet*, 5 Serg. & Rawle, 523; *Certain Casks of Hardware*, 4 Law Reporter, 36). In another, because the code had been promulgated by the executive department of our government as authentic. (*Talbot v. Seaman*, 1 Cranch. 1). In another, because the copy had been sent to the supreme court of the United States by authority of a foreign government. (*Ennis v. Smith*, 14 How. 400). In that case it was said as the *ratio deciduedi* that a foreign written law may be received when it is found in a statute book, with proof that the book has been officially published by the government that made the law. This does not exhaust the list of cases nor the actual or possible modes of authentication. The only rule to be made out of the late American cases is, that *the copy of the statute must be shown, to the reasonable satisfaction of the court, to be genuine*. Now we all know, and it is virtually admitted in this case, as I understand the argument, that we are fully as well able to verify the printed copies of the Merchant Shipping Act, as any expert could be. In the case in 4 Law Reporter, 36, Judge Betts said he should have received the statute without the oath, which proved it to have been bought of the Queen's printer.

The law is a progressive science, and, if printed books have superseded manuscripts, and are cited instead of verified copies, we may as well acknowledge the fact and act accordingly. Between the doctrine, which has never obtained in America, if it does anywhere, that there must always be a sworn expert, and one which shall admit printed books of known authority, to prove foreign statutes, I see no safe middle-ground."

The proof in this case is altogether satisfactory that the publication in question is commonly received in Scotland as a true copy of the statute of Great Britain, called "The Companies' Act, 1862." There is no room for doubt, and no one conversant with the matter has any on the subject. The witnesses who state the fact are credible. Nothing appears to affect either their veracity or intelligence; and their means of knowledge are sufficient to enable them to speak unqualifiedly and entitles them to be heard with confidence. It is not necessary that they should be lawyers. They do not testify as experts, although they might be able to, within the rule laid down in *American Life Ins. & Trust Co. v. Rosenagle*, 77 Pa. St., 514, but as common witnesses to a fact within their observation, namely: That the publication in question is commonly received in the business and courts of Scotland as sufficient proof of the existence and terms of the act concerning the incorporation of trading companies of August 7, 1862.

The provisions of The Companies Act, relative to the question of the incorporation of the plaintiff, are as follows:

Section 6. "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company, with or without limited liability."

Among other things sections 14 and 17 provide that "the memorandum of association" must in certain cases, and may in any, "be accompanied when registered by articles of association, signed by the subscribers to the memorandum of association, and prescribing such regulations for the

1886.]

Opinion of the Court—Deady, J.

company" as said subscribers "deem expedient;" and that said memorandum and articles, "if any, shall be delivered to the registrar of joint stock companies * * * who shall retain and register the same."

Section 18 provides, among other things, that upon the registration of the memorandum and articles, "the registrar shall certify under his hand that the company is incorporated;" and "the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company."

From this it appears that the law of Great Britain authorized the incorporation of the plaintiff; and the next question is, was it ever organized thereunder?

Mr. Mackenzie testifies that exhibit B is a true copy of the memorandum and articles of association of the plaintiff compared by him with the originals on file in the office of the registrar of joint stock companies for Scotland.

The memorandum and articles of association, being deposited and registered in a public office, are public writings, and may be proved by a copy examined and compared with the originals by a witness who swears to its correctness.

The evidence is sufficient that the exhibit B is a true copy of the originals; and it appears therefrom that the proper number of persons, on April 21, 1876, duly signed a memorandum of association, for the incorporation of "The Dundee Mortgage and Trust Investment Company, limited," with a registered office in Scotland, for the purpose; among others, of "making advances of money, repayable with interest," on "mortgages and other liens of and over" real property in any of the United States, and the purchase of mortgages or funds therein.

Mr. Mackenzie also testifies that the certificate printed on page 23 of exhibit B is a true copy of a certificate of incorporation given to the plaintiff by the register, pursuant to section 18 of "The Companies Act," on May 2, 1876, and that exhibit D, dated December 19, 1879, is an original cer-

tificate, so issued to the plaintiff and in the custody of the witness, as its secretary.

In the latter one it is certified that the plaintiff "was incorporated under the Companies Acts, 1862 and 1867, as a limited company, on the second day of May, 1876," while in the copy it is stated that the plaintiff "is this day incorporated under the Companies Acts, 1862 and 1867, and that it is a company limited by shares."

The certificate of incorporation, when delivered to the plaintiff, became a private writing in private custody, and can not be proved, so long as it is in existence, by a copy, or otherwise, than by the production of the original. It is not sufficient that the witness produces a paper and swears that he has compared it with the original, and that it is a true copy thereof. The adverse party is entitled to an inspection of the original. But as it is a private writing, in private custody, he can not have this inspection unless it is produced, before the examiner. And when produced, the examiner may make a copy of it, and attach the same to the testimony of the witness and return him the original, unless the case is one where the integrity of the latter is questioned and its physical features are material to the inquiry.

Counsel for the defendant suggests that exhibit D cannot be received as the certificate authorized by section 18 of the act, because he says it is a duplicate of a later date, so to speak, of the one of May 2, 1876, the original of which is not produced.

No authority is cited on the point, and the statute is silent on the subject. But considering the nature and purpose of the certificate, that it is given to the corporation simply as the convenient evidence of its existence and right to act as such, no reason occurs to me why the registrar may not, if he will, issue it in duplicate. And if he does one of them is of the same force and effect as the other, for they are both originals. It may be very convenient, where, as in this case, a corporation is formed for the transaction of business in many parts of the world, to have the certificate in duplicate or even more, so as to enable it to defend or assert its corporate character, when and wherever it may be necessary.

But it is not clear that these instruments are duplicates. It is true that while couched in different language they are essentially the same (Rap. & Law. L. Dic., Duplicate)—they both state the fact that the plaintiff became a corporation, by the name assumed, under “The Companies Act, 1862” on May 2, 1876.

But as some years appear to have elapsed between the date of the certificates, it may be more correct to characterize them as originals issued successively but separately on the same facts or transaction, than as duplicates, which implies, I think, simultaneous execution or origin.

And assuming this to be a fact, the force and effect of the second certificate, as evidence of the facts stated therein, is not at all impaired by the circumstance that it was issued some time after the registry of the memorandum and articles. It is doubtless contemplated by the act, that the register will issue the certificate as soon as the corporation is entitled to it.

But there is nothing in the act or the circumstances of the case that makes its validity depend on the date of its issue. So far, at least, as third persons are concerned, it is immaterial when it issues, so that it is subsequent to the registration of the memorandum and articles of association by the registrar.

But speaking by the evidence, this is really the only certificate that ever was issued to the plaintiff. The attempt to prove the issue of one of May 2, 1876, failed. The original was not produced, and the alleged copy is not competent evidence of the fact.

On the whole my conclusion is, that the plea in abatement is not proved. On the contrary, it satisfactorily appears plaintiff is a duly organized corporation under the laws of Great Britain, with power and authority to take an assignment of these notes and mortgage and to maintain this suit thereon.

This defense is purely technical and utterly without merit. It is admitted that the defendants have the legal right to make it, even if they should thereby succeed in defrauding the plaintiff out of this large sum of money. In

Opinion of the Court—Sawyer, C. J.

[March,

the administration of justice by finite beings according to finite laws, it must sometimes happen that the wrong prevails.

But happily, in this case, the attempt to escape the payment of an honest debt, on the ground set up in the plea, has so far come to naught.

THEURKAUF v. IRELAND.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MARCH 22, 1886.

1. TIME OF REMOVAL.—A petition for removal must be filed at the term when the case can first be put at issue and tried, or it will be too late. In California sessions provided for are terms.
2. COURTS—JURISDICTION—STATE AND NATIONAL COURTS—CONSTRUCTION OF STATUTE.—A question involving the right to public land claimed by one of the parties to have been pre-empted by him under a statute of the United States, does not fall within the jurisdiction of the circuit court unless it actually involves the construction of a United States statute.

Before SAWYER, Circuit Judge.

MOTION TO REMAND.

Mr. S. F. Geil, Mr. K. V. Morehouse and Mr. J. P. Meux,
for plaintiff.

Mr. N. A. Dorn and Thomas Renison, for defendant.

SAWYER, Circuit Judge. On December 14, 1885, the last day for answering, a demurrer to the complaint was filed; one of the grounds being that the complaint does not state facts sufficient to constitute a cause of action. On December 21 the demurrer was withdrawn by consent of parties, and defendant allowed ten days' further time within which to answer to the merits. At the expiration of the ten days allowed, defendant procured another extension of time to answer, which carried it to January 10, 1886. On January 9, 1886, defendant answered, and immediately afterward, on the same day, filed a petition for removal. Section 73, of the code of civil procedure, provides that the superior courts "shall hold regular sessions, commencing on the first Mon-

1886.]

Opinion of the Court—Sawyer, C. J.

days of January, April, July, and October," and it further provides that said courts "shall be *always open*," "except on legal holidays and non-judicial days." The sessions thus provided have often been held, by this court, to be "terms" in this state, within the meaning of the removal act of 1875. (*McNaughton v. Southern Pacific Railroad Company*, 10 Sawy. 113; S. C., 19 Fed. Rep. 881.) Thus, it will be seen that this case might have been, in fact, tried at the October session or term; and if it was not then tried, it was not the fault of the law, but the fault of the attorneys in dallying along by stipulations for further time. A new term commenced January 4. The cause was at issue, ready for hearing on the general demurrer, and could then have been heard on December 14th, at the October term, as the court is always open, and a trial on general demurrer is a trial within the meaning of the act, as held by the supreme court in *Alley v. Nott*, 111 U. S. 472; S. C., 4 Sup. Ct. Rep. 495; *Gregory v. Hartley*, 113 U. S. 742; *Scharf v. Levy*, 112 Ib. 711. But the demurrer was manifestly frivolous, and put in for delay. An answer might then have been filed, and the case would have been at issue on the facts.

The demurrer was withdrawn by consent, and defendant given ten days' further time to answer. Had the answer, even then, been filed, it would have been at issue on the facts, and could have been tried during that term; but the time was again extended, and by such delays and extensions the case was carried over the term. The October session was, clearly, the term at which it could be first tried, and the petition was filed too late. (*Pullman Palace Car Co. v. Speck*, 113 U. S. 84; S. C., 5 Sup. Ct. Rep. 374; *Alley v. Nott*, 111 U. S. 472; S. C., 4 Sup. Ct. Rep. 495.)

The plaintiff alleges that he is seized in fee. This is denied in the answer, and defendant alleges affirmatively that the land in question is public land, subject to pre-emption; and that he, being duly qualified, entered within plaintiff's inclosure, and performed the necessary acts to establish a valid pre-emption claim; that he claims a pre-emption right; and that plaintiff claims no right under the laws of the United States; and, upon this allegation of

Points decided.

[March.]

facts, he alleges his legal conclusion, that the cause arises under the laws of the United States, and that, upon that ground, this court has jurisdiction. But it does not appear that there is any disputed construction of any statute of the United States involved. It does not appear but that both parties agree upon the construction of the pre-emption laws. For all that appears from the facts alleged, the whole controversy may turn on the proof of the facts. There is nothing to show that any disputed question of construction will arise, and this must affirmatively be shown, in order to make it affirmatively appear that the court has jurisdiction. It might as well be claimed that it is a proper case for jurisdiction by alleging that the plaintiff claims title by virtue of a patent issued by the United States, without stating that there is any question arising upon a disputed construction of the patent, or any dispute as to its validity. The authorities are numerous to the effect that the record in this case does not affirmatively disclose a case over which the court has jurisdiction; and that it is insufficient to sustain a removal. (*Trafton v. Nougues*, 4 Sawy. 178; *Gold Washing Co. v. Keyes*, 96 U. S. 199; *Hambleton v. Duham*, 10 Sawy. 490; S. C., 22 Fed. Rep. 465.)

On both grounds the case must be remanded to the state court, and it is so ordered.

THE UNITED STATES v. JAMES A. HEARING.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 22, 1886.

1. PERJURY—SECTION 2294 OF THE REVISED STATUTES.—An applicant for the entry of land, under the homestead act, may make oath to the ex-cusatory facts that authorize him to verify the affidavit accompanying his application, before the clerk of the county, as provided in section 2294 of the revised statutes, and if such oath is willfully and knowingly false in any material particular, or includes a statement of fact which such applicant did not believe, he is guilty of perjury as defined by section 5392 of the revised statutes.

1886.]

Opinion of the Court—Deady, J.

2. **IDEM—ALLEGATION THAT OATH IS “CORRUPTLY” FALSE.**—It is not necessary in an indictment under section 4392 of the revised statutes to allege that the oath of the defendant was “corruptly” false, but it is sufficient to describe the offense in the language of the statute.
3. **JURAT.**—In an indictment for perjury in swearing to an affidavit, it is not necessary that it should appear that the officer before whom the oath was taken wrote a jurat or memorandum of the transaction on the instrument; but it is sufficient, after setting out the affidavit, to allege that the defendant, being duly sworn, did depose and say that the same was true; and the facts may be proved by parole.
4. **ALLEGATION THAT DEFENDANT WAS SWORN.**—In an indictment for perjury it must distinctly appear that the defendant was duly sworn.

Before DEADY, District Judge.

Mr. James F. Walton, for the plaintiff.

Mr. W. D. Fenton, for the defendant.

DEADY, J. The defendant is accused by the grand jury of the crime of perjury, alleged to have been committed as follows:

On December 8, 1883, the defendant having then and there subscribed the following written declaration and affidavit:

“Homestead affidavit under section 2294, revised statutes, for settlers who cannot appear at the land office. Office of the clerk of the court for Linn county, December 8, 1883.

“I, James A. Hearing, of Sweet Home, Linn county, Oregon, having filed my homestead application No. —, do solemnly swear that I am a native citizen of the United States, over the age of twenty-one years; that said application No. — is made for the purpose of actual settlement and cultivation; that said entry is made for my exclusive use and benefit, and not directly or indirectly for the use or benefit of any other person or person whomsoever; that I am now residing on the land I desire to enter, and that I have made a *bona fide* improvement and settlement thereon; that said settlement was commenced December 5, 1883; that my improvements consist only of some slashing done on the place, and that the value of the same is five dollars; that owing to the great distance I am unable to appear at the district land office to make this affidavit, and that I have never before made a homestead entry except:

Opinion of the Court—Deady, J.

[March,

“James A. Hearing—did then and there, before C. H. Stewart, clerk of the courts for Linn county, Oregon, then and there having full authority to administer said oath, falsely, knowingly, and contrary to his said oath, depose and state that the foregoing and hereinafter set forth affidavit was true.

“That it was not true that the said defendant was then or at any time before said December 8th residing on the land he desired to enter, and that it was not true that he had made any settlement or improvement thereon, and that it was not true that his improvements consisted of some slashing done on the place, and that it was not true that the value of the same was five dollars;” that the said defendant, “when he took said oath and made said statements,” well knew the same to be false, and did not believe the same or any one of them to be true; and that each of said statements was material.”

The indictment was found on July 16, 1885, and on November 30th the defendant demurred thereto, for that it did not state facts sufficient constitute a crime.

On the argument sundry points were made in support of the demurrer which will be noticed hereafter.

The indictment is based on section 5393 of the revised statutes, which provides:

Every person who having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished as therein stated.

By section 1 of the act of May 20, 1862 (12 Stat. 392; sec. 2289 R. S.), the privilege of entering a quarter section or less of the public land subject to pre-emption was given to any person who is the head of a family, or 21 years of age and a citizen of the United States, or has declared his intention to become such. By section 2 of the same (sec. 2290

1886.]

Opinion of the Court—Deady, J.

R. S.), the person applying for the benefit of the act is required to make an affidavit before the register or receiver, showing that he is entitled thereto, and also that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person;" and by section 3 of the act of March 21, 1864 (12 stat. 35; section 2294 R. S.) it is provided that—

"In any case in which the applicant for the benefit of the homestead and whose family or some member thereof, is residing on the land which he desires to enter, and upon which a *bona fide* improvement and settlement have been made, is prevented by reason of distance, bodily infirmity or other good cause from personal attendance at the district land office, it may be lawful for him to make the affidavit required by law before the clerk of the court for the county in which the applicant is an actual resident."

The affidavit in this case states not only the qualification of the applicant and his purpose in making the entry, as required by section 2290 of the R. S., but also the facts and circumstances which authorized it to be made before the clerk, rather than the register or receiver.

The assignments of perjury in the indictment are all made on the defendant's statement in the affidavit concerning these facts and circumstances. Substantially, they are—it is not true that on or before December 8, 1883, the defendant either (1) resided on the land in question; (2) made any improvement or settlement thereon; (3) did any "slashing" on the place or (4) that said slashing was of the value of five dollars.

There is no express provision in the statute requiring these matters to be shown by the oath of the applicant or otherwise before the affidavit showing his right to make the entry can be received at the land office.

Counsel for the demurrer contends on this state of the statute, that there is no law in the United States which authorized the administration of an oath to the defendant concerning these excusatory facts and circumstances, and

Opinion of the Court—Deady, J.

[March,

therefore the case does not fall within the provisions of section 5393 of the R. S., defining the crime of perjury.

It is not directly contended that the existence of these facts was not material to the right of the defendant to make his proof of qualification and purpose before the clerk to make an entry under the homestead act, but only, that however material they may have been in that connection, the statute did not require or authorize the defendant to make an oath to them.

The oath of the applicant to the affidavit or the excusatory facts is not compulsory. But whoever wishes to have the benefit of the homestead act must show in some way the existence of the facts which entitle him thereto. And these, when not of record, being within the applicant's knowledge may be shown by his own oath. As to the facts showing the qualification of the applicant and his purpose in making the entry, the statute expressly permits and requires them to be proven by his oath. And if there were no specific direction in the statute on the subject, I think he would be allowed to do so as a matter of course. And this is the condition of the statute in regard to these excusatory facts. The mode of their proof is not prescribed, and convenience, usage and necessity all point to the oath of the party as the proper evidence of their existence.

Certainly it would be within the power of the department to make a regulation on the subject, permitting or prescribing this mode of proof in such a case.

In *U. S. v. Bailey*, 9 Pet., 238, it was held that the act of March 1, 1823 (3 Stat., 771), declaring "that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States," he shall be guilty of perjury, included, in the language of the syllabus, "an affidavit taken before a state magistrate, authorized to administer oaths, in pursuance of a regulation or in conformity with a usage of the treasury department, under which the affidavit would be admissible evidence at the department in support of a claim against the United States, and perjury may be assigned thereon."

1886.]

Opinion of the Court—Deady, J.

So here; the statute not having prescribed the mode of proving the excusatory or preliminary facts, a regulation of the department might direct or permit that it be done by some such recognized mode of proceeding, as the oath of the applicant, and thereupon such oath when taken is administered, in effect, under or in pursuance of a law of the United States, and therefore perjury may be assigned thereon.

Whether such a regulation exists or not, is a matter within the judicial knowledge of the court—that is, it is a matter about which the court may inform itself. My attention has not been called to any specific regulation of the department on the subject, but I am quite certain there is one. The facts must be shown in some way, before the affidavit can be sworn to before the clerk; and as the statute is silent thereabout, in the nature of things twenty years would not have elapsed without some department regulation or usage on the subject. The affidavit used in this case is evidently a blank form filled up, and if so, in all probability a department blank. And the reasonable inference from this fact, if it be one, is that there is a regulation of the general land office to the effect that the affidavit required of an applicant for a homestead entry, when made before a clerk, may contain a statement of the facts which authorize the affidavit to be verified before such officer.

But I think that even in the absence of any statute or department regulation on the subject, the applicant might prove the existence of the facts which authorized him to swear to his affidavit before the clerk, by his own oath. As I have said, they must be shown or proven in some way before an affidavit taken by a clerk can be used in the land office. The usual way of proving facts like these in such a proceeding, is the oath of the applicant. And if they are so proved, I think the oath may be made before the clerk authorized to take the affidavit.

As the authority of the clerk to swear the applicant to the affidavit depends on the existence of the facts excusing the latter's attendance at the land office, it is convenient and proper that they should be made to appear to him, before

administering the oath of the applicant. And this may be conveniently done by incorporating the applicant's statement concerning them in his affidavit. On the other hand, if the proof of these facts must be made before the register or receiver, the applicant is, in effect, deprived of the privilege of making his affidavit at home, before the clerk. And if he attends at the district land office at all, he has no use for the excusatory facts and may make his affidavit there without any reference to them.

On the whole, my conclusion is, the act of 1864 permitting an applicant to make his affidavit for a homestead entry in a certain contingency before a clerk, by a necessary implication requires such applicant, before he can avail himself of such privilege, to show by oath that such contingency exists; and that the clerk may, as incidental to his power to take the affidavit, administer such oath.

The matter is also material, for on the existence of the excusatory facts depends the power of the clerk to administer the oath to the affidavit and the right of the applicant to take the same before him, and use it in the land office.

Neither is it necessary to allege in the indictment that the false oath was taken "deliberately and corruptly" or otherwise than as indicated by the language of the statute, defining the crime, namely, that the defendant—"willfully and contrary" to his oath to testify truly did state what he did "not believe to be true."

If the defendant willfully stated in his affidavit that which he did not believe to be true, he thereby committed the perjury defined in this statute, and nothing further need be alleged to show it. It is admitted that in charging a common law perjury it is usual and probably necessary to allege that the oath is willfully and corruptly false. (2 Whar. C. L., sec. 1286; 2 Bish. C. L., sec. 1046).

But this is a statute offense, and it is sufficient to describe it in the words of the statute. In this case the *corruptness* or evil intent is sufficiently manifest from the terms of the statute. No one can willfully testify in a matter material, to that which he does not believe, with other than an evil intent; or in other words, corruptly.

1896.]

Opinion of the Court—Deady, J.

Nor is it necessary that it should appear from the indictment that the clerk made a *jurat* or memorandum on the affidavit, stating when and where the defendant swore to the same. If the oath was in fact administered by the clerk to the defendant, it is not necessary, for the purpose of this proceeding, that he should have made a memorandum of the fact on the affidavit or elsewhere. The guilt or innocence of the defendant depends on the state of his knowledge when he took the oath, and not on the subsequent conduct of the officer in making or omitting to make a memorandum of the transaction.

But I do not think it is sufficiently alleged in the indictment that the defendant was sworn to the affidavit.

The affidavit and the subscription thereto are set out in the indictment, and this should have been followed by an allegation to the effect, that the defendant being then and there duly sworn by the clerk of the court for Linn county, did depose and state that said affidavit was true.

The allegation in the indictment that the defendant did depose and state contrary to his *said oath*, is, if anything, an attempt to assign perjury on a "said" or supposed oath, the administration of which is nowhere alleged.

But the fact that the defendant was sworn must be distinctly stated. It is not sufficient even that it appears by implication. (2 Whar. C. L., sec. 1287).

It is also objected to the indictment that it does not allege that the defendant was a resident of Linn county at the time of taking the oath; and that the affidavit refers to an application not identified by number or description of the land mentioned therein.

But as the demurrer to the indictment must be sustained because it does not appear therefrom that the defendant was sworn to the affidavit, it is not necessary to consider these objections.

If the defendant was sworn to the affidavit set out in the complaint, before the clerk, and the same was false to his knowledge in any one of the particulars alleged, an indictment for perjury may be maintained thereon. I will, therefore, submit the matter to the next grand jury for their con-

Opinion of the Court—Deady, J.

[March,

sideration, when these objections may be obviated in the preparation of another indictment.

The demurrer is sustained, and the charge is directed to be submitted to the next grand jury.

IN THE MATTER OF THE GRAND JURY.

DISTRICT COURT, DISTRICT OF OREGON.

MARCH 23, 1886.

EXPULSION OF CHINESE—VIOLATION OF THE TREATY AND LAW PERMITTING THEM TO RESIDE IN THE UNITED STATES.—The grand jury advised to find indictments under section 5336 of the R. S., against persons guilty of driving or attempting to drive the Chinese out of the country, or of maltreating or intimidating them for the purpose of constraining them to depart from the country, because such conduct is calculated and *prima facie* intended, to prevent and hinder the execution, operation or fulfillment of the treaties and laws of the United States permitting the Chinese to reside here.

Before DEADY, District Judge.

DEADY, J. After instructing the grand jury as to the general nature of their powers and duties and mode of proceeding, the court called their attention specially to the recent attacks on the Chinese in this vicinity, and gave them the following charge on the subject:

An evil spirit is abroad in this land—not only here, but everywhere.

It tramples down the law of the country and fosters riot and anarchy.

Now it is riding on the back of labor, and the foolish Issachar couches down to the burden and becomes its servant.

Lawless and irresponsible associations of persons are forming all over the country, claiming the right to impose their opinions upon others, and to dictate for whom they shall work and whom they shall hire, from whom they shall buy, and to whom they shall sell, and for what price or compensation. In these associations the most audacious and unscrupulous naturally come to the front, and for the time being control their conduct. Freedom, law and order

1886.]

Opinion of the Court—Deady, J.

are so far subverted and a tyranny is set up in our midst most gross and galling.

Nothing like it has afflicted the world since the middle ages, when the lawless barons and their brutal followers desolated Europe with their private wars and predatory raids, until the husbandman was driven from his ravaged field and the artisan from his pillaged shop, and the fair land became a waste.

The dominant motive of the movement is some form of selfishness and its tendency is backward to barbarism—the rule of the strongest, guided by no other or better precept than this, “might makes right.”

This is not the time or place to inquire into the cause of this condition of society. It may be the natural outcome of the modern political economy, which assuming that the conflict of private interests will produce economic order and right, has reduced the relation between capital and labor to the mere matter of supply and demand, and limited the duty and obligation of the one to the other, to the payment of the minimum of wages for the maximum of labor on the one hand, and the getting the maximum of wages for the minimum of labor on the other.

But whatever the cause, I have faith that the teaching of experience and the good sense and love of justice of the people will find a remedy for the evil in time. And in the meanwhile it behooves those of us into whose hands the administration of the law and the conservation of the public peace is confided, to do what we can wisely but firmly, to prevent this evil spirit from destroying the material resources of the country and making any improvement in the condition of society, in this respect, still more difficult and doubtful.

Lately, this spirit has been manifesting itself in Oregon, by assaulting, robbing and driving out the helpless Chinese who are engaged among us at lawful labor for an honest living.

The excuse given for this conduct is that the Chinese are taking the bread out of the mouths of their assailants by working for less wages and living cheaper than the latter

Opinion of the Court—Deady, J.

[March,

can. In other words, they complain of the industry and economy of the Chinese as being beyond their competition.

As we all know, this statement must be taken with much allowance. True, the Chinaman is industrious and economical, and he has the advantage of being temperate and faithful to his engagement. But he demands and gets better wages here than white men in any other part of the world, and, save in the matter of whisky and tobacco, he lives as well and is as well clad as the bulk of common laborers anywhere.

But this outcry against the Chinese as laborers is not new. It was heard from thirty to fifty years ago, when the native mobs in our eastern towns and cities undertook to drive out the comparatively "cheap labor" of Ireland and Germany, particularly the latter, that was then crowding into this country and filling the places of the slothful and shiftless.

It is not necessary now to consider the right of a people to oppose or put a stop to an undesirable immigration. For my own part I have no doubt that the United States has the same right to prevent an immigration within its boundaries, of people that it deems objectionable, as it would have to repel an armed invasion by them.

But this is a matter for the whole country, represented by the national government, to decide, and not for individuals or neighborhoods, or even states.

The Chinese now in this country are here under the sanction of a solemn treaty with the United States, and any attempt on the part of individuals, acting singly or in numbers to expel them by any threat, menace, violence or ill usage is not only wrong but unlawful.

Our treaty relations with China extend over a period of more than forty years.

On July 3, 1845, a "treaty of peace, amity and commerce" was negotiated by Caleb Cushing, on behalf of the United States. (Pub. Treat. 116.) By it the citizens of this country were granted the right to frequent and reside with their families, and trade at the five ports of Kwang-Chow, Amoy, Fuchow, Ningpo and Shanghai.

1886.]

Opinion of the Court—Deady, J.

On June 18, 1858, William B. Read negotiated another treaty, in which the government of China agreed to defend the citizens of the United States in China "from all injury or insult of any kind." (Pub. Treat. 129.) To this there was a supplement, on November 8th, of the same year. (Pub. Treat. 137.)

On July 28, 1868, a treaty was negotiated by William H. Seward, containing sundry articles in addition to the last one. (Pub. Treat. 147.)

By article V of this treaty, "the United States and the emperor" cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as *permanent residents*. The high contracting parties therefore join in reprobating any other than an entirely voluntary emigration for these purposes."

Article VI provides: "Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may be there enjoyed by the citizens or subjects of the most favored nations; and reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges and immunities and exemptions in respect to travel or residence as may be then enjoyed by the citizens or subjects of the most favored nation."

On November 17, 1880, another treaty concerning "immigration" was negotiated. (22 Stats. 826.)

Article 1 of this treaty gave to the United States the right to "regulate, limit or suspend," but not to "absolutely prohibit," the coming to or residence of Chinese laborers in the United States whenever it was thought that their residence here was contrary to "the interests" of the country or endangered "the good order" thereof.

Article 2 provided that Chinese, other than laborers and Chinese laborers then in the United States, "shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges and immu-

Opinion of the Court—Deady, J.

[March,

nities and exemptions which are accorded to the citizens and subjects of the most favored nation."

Under the concession contained in this treaty congress passed the restriction act of May 6, 1882 (22 Stat. 58), suspending the coming of Chinese laborers to this country for the term of ten years from the expiration of ninety days after the date thereof.

The significance of the stipulation in the foregoing treaties with China, to the effect that the Chinese in this country shall be entitled to all the privileges and immunities that are "accorded to the citizens and subjects of the most favored nation," will be better understood by a reference to our treaty stipulations with Great Britain on that subject.

By article 1 of the treaty of "commerce" with that country, of July 13, 1815 (Pub. Treat. 293), renewed and continued in force by article 4 of the treaty of October 20, 1818 (Pub. Treat. 299), and further indefinitely continued by article 2 of the treaty of August 6, 1827 (Pub. Treat. 312), it is provided: "The inhabitants of the two countries, respectfully, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers in the territories aforesaid (of the United States and Great Britain in Europe), to which other foreigners are permitted to come, to enter into the same, and to come and reside in any parts of the said territories, respectively."

From this brief statement of the treaties bearing on the subject, you will perceive that any attempt to compel or constrain any Chinese resident of this country to remove from or to any particular place, or to refrain from following any lawful occupation or doing any lawful work that he may find to do, is not only morally wrong but contrary to the law of the land.

It is commonly known that during the past few weeks gangs of masked men have, in the night time, entered the houses and camps of peaceful Chinese residents, engaged in useful labor at various points in the vicinity, and by serious intimidation and threats of personal violence, have compelled them to leave their homes and work and come to Portland.

1886.]

Opinion of the Court—Deady, J.

There is no doubt but that this brutal and inhuman conduct is a gross violation of the rights guaranteed to these people by the national government through the treaties aforesaid. Nor is there any doubt of the power of congress to provide for the punishment of any person who injures, annoys or disturbs any subject of a foreign government, resident in any part of the United States, contrary to the treaty stipulations with such government.

The powers of the national government, though limited in number and subject, are supreme in their sphere. A treaty with a foreign power is the supreme law of the land; and congress may provide a punishment for its infraction or the deprivation of or injury to a right secured by it, as in the case of an ordinary law.

Without this power the national government would be unable to keep faith with other nations. In all our external relations the individual states are unknown. The government of the Union or United States stands for all, and in this respect may enforce obedience to its authority by the prosecution and punishment of individuals who act contrary thereto.

The next question is, has congress passed any law for the punishment of persons who, contrary to the treaty stipulations, molest the subjects of foreign powers resident in this country?

So far as my judgment goes, the matter is not free from doubt. I am quite clear that congress has not passed any act having this object solely and directly in view. The reason for the omission may be, that heretofore it was not thought necessary, as each state could and would, in the ordinary course of justice, furnish protection to all persons living within its border. But this illusion has been dispelled; and experience has demonstrated that unless the general government furnishes the Chinese on this coast with protection, their treaty rights may be violated with impunity.

Section 5519 of the revised statutes is broad enough in its terms to cover the case. This is section 2 of the act of April 20, 1871 (17 Stat. 13), passed to enforce the fourteenth

Opinion of the Court—Deady, J.

[March,

amendment, and provides for the punishment of persons who "conspire or go in disguise upon the highway or upon the premises of another for the purpose of depriving" any one of "the equal protection of the laws," etc. But in *U. S. v. Harris*, 106 U. S. 629, the supreme court held that this section, as regarded the inhabitants of a state simply, was unconstitutional; that the prohibition of the amendment as to "equal protection of the law," was directed against the state, and not individuals, and therefore congress could not, by way of enforcing such amendment, provide for the punishment of individuals who commit such acts.

Notwithstanding this decision, it has been suggested that, although this section is unconstitutional, as an act to enforce the fourteenth amendment, it is valid as an act to enforce treaty stipulations guaranteeing a foreigner, living in any state, the protection of the laws therein. The suggestion is a plausible one, to say the least of it, but I do not feel confidence enough in it to adopt it.

Section 5336 of the revised statutes, which is also carved out of section 2 of the act of April 20, 1871 (17 Stat. 13), to enforce the fourteenth amendment, "and for other purposes," provides that—

"If two or more persons in any state or territory conspire to overthrow, put down or destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof; *or by force to prevent, hinder or delay the execution of any law of the United States;* or by force to seize, take or possess any property of the United States contrary to the authority thereof; each of them shall be punished by a fine of not less than five hundred dollars and not more than five thousand dollars, or by imprisonment with or without hard labor for a period of not less than six months nor more than six years, or by both such fine and imprisonment."

This section has nothing to do with the fourteenth amendment, and there is no doubt of its constitutionality. It was copied into the act of 1871, aforesaid, from the act of July 31, 1861 (12 Stat. 284), "to define and punish certain conspiracies" against the United States, of a seditious or treasonable character.

1886.]

Opinion of the Court—Deady, J.

And the only question now is, does it include the acts or conduct under consideration?

Speaking only for this occasion, and reserving my final judgment until I may hear the matter fully argued, I think it does. The attempt to drive the Chinese out of the country, or to maltreat or intimidate them with a view of constraining them to depart, is *prima facie* an attempt to prevent and hinder the execution, operation or fulfillment of a law of the United States, namely, the treaties with China of 1868 and 1880. And a conspiracy or agreement of two or more persons to engage in such conduct may for that reason be well characterized as a seditious and treasonable conspiracy against the authority and laws of the United States.

A mere assault or even robbery committed on a Chinaman without any ulterior purpose other than a desire to vex and annoy or to steal, may not be a violation of this section. *Prima facie*, such conduct is not intended to prevent the execution or operation of the law of the United States giving the Chinese the right to reside here indefinitely.

But when, as I have said, the purpose of the conduct is to expel the Chinese from the country, either by direct deportation or such intimidation or violence as is likely to constrain them to go, I instruct you that the case comes within that clause in the section which makes it a crime "by force to prevent, hinder or delay the execution of any law of the United States."

Some cases will be submitted to you by the district attorney of persons charged with mobbing and driving Chinese in this vicinity, who have been held to answer therefor before you.

Take these cases and examine them carefully, and if you find that any of the parties have maltreated, menaced or intimidated Chinese for the purpose or with the intent to compel or constrain them to leave the country or to remove from any place therein, it will be your duty to present them to the court for trial.

Trusting that you will do your duty in the premises, and that you will, according to the obligation of your oaths and

Opinion of the Court—Deady, J.

[March,

your duty as citizens, present things truly as they come to your knowledge, without fear, favor or affection, I commit the matter to your hands.

See *Baldwin v. Franks*, 120 U. S. 678; and *Post*, 533.

THE ABERCORN—J. E. CAMPBELL, LIBELLANT.

DISTRICT COURT, DISTRICT OF OREGON.

MARCH 25, 1886.

1. PILOTAGE ON COLUMBIA RIVER—RIGHT OF MASTER TO CHOOSE PILOT.—The Columbia river is the boundary between two states—Oregon and Washington—within the purpose and spirit of section 4236 of the revised statutes, and therefore the state of Oregon cannot require a vessel bound in or out of said river to take an Oregon pilot or pay him half or any pilotage, if the master thereof prefers to and does take a Washington pilot.

Before DEADY, District Judge.

Mr. Raleigh Stott, for libellant.

Mr. Henry Ach, for the claimant.

DEADY, J. This suit was commenced on December 26, 1885, to recover the sum of one hundred and seventy-six dollars for half pilotage.

It was heard on February 15th, on an exception to the answer, and the decision has since been delayed to suit the convenience of counsel.

It is alleged in the libel, that the libellant, J. E. Campbell, is and since prior to October 19, 1885, has been a duly licensed pilot under the law of Oregon and the United States for the Columbia river bar, attached to the pilot boat Governor Moody, and that on or about said October 19th he piloted the British bark Abercorn from the sea over the bar to Astoria; that afterward, and before the commencement of this suit, said vessel was lying at Astoria, drawing twenty feet of water, and bound out to sea, when the libellant offered his services to the master to pilot her over the bar, which offer was refused, and said vessel is going to sea with a pilot other than one belonging to said boat, where-

1886.]

Opinion of the Court—Deady, J.

fore the libellant is entitled to recover the value of the services so tendered and refused, namely: the sum of one hundred and seventy-six dollars.

The answer of James Laidlaw, the agent of the owners, substantially admits the allegation of the libel, and as a defense thereto, alleges that at and before the tender of pilot service by the libellant, the master of the Abercorn had employed Alexander Malcolm, who was a duly licensed pilot under the law of Washington and the United States, to pilot said vessel to sea; and that said Alexander Malcolm did thereafter so pilot the same, for which he was duly paid by said master.

The libellant excepts to this defense as irrelevant.

By the Oregon pilot act of October 20, 1882, the pilot commissioners for the Columbia river and bar, may license as many bar pilots as they may deem necessary; and such pilots must keep a seaworthy boat of a certain tonnage on the pilot ground. (See. Law, p. 19).

Section 33 of the act provides that—

“A pilot who brings a vessel in over the Columbia river bar is entitled to pilot her to sea, when next she leaves the river;” but the commissioners may allow the master to take another pilot from the same boat.

The object of this section was to reward a pilot for cruising off shore for vessels bound into the river, by giving him the exclusive right to the comparatively easy and lucrative service of taking a vessel out that he had been to the trouble of finding and bringing in. And by section 30 of the act (Ses. L., p. 20), it provided that if such pilot's offer of services is declined by the master, he shall pay him half pilotage. A claim for pilotage on such grounds may be enforced in the admiralty, either against the master or the vessel. (*The Glencarne*, 7 Sawy. 222).

By section 21 of the act of February 18, 1885 (Ses. L., p. 35), the pilot commissioners were required to build a pilot boat at the expense of the state, for the use of the bar pilots licensed by them, which it is well understood has been done, and that the vessel mentioned in the libel as the Governor Moody, to which the libellant is attached, is the boat.

Opinion of the Court—Deady, J.

[March,

The object of this legislation, so far as appears, was to deprive the tug boats at the mouth of the river of the privilege of carrying bar pilots or being in any way engaged in the pilot service. The result is so well known that it may be mentioned here as a fact. The pilots connected with the tugs have taken out licenses as bar pilots under the laws of Washington, and are piloting vessels over the bar in connection with the towage service. Hence this controversy. The pilot Malcolm is a Washington pilot, and doubtless cruises on one of the tugs, and when he piloted the Abercorn to sea he did so as what may be called a tug pilot, in contradistinction to a schooner pilot.

Congress having the power to regulate commerce, may regulate pilotage as a matter pertaining thereto, on the navigable waters of the United States. But until congress exercises such power the state may make such regulations. (*The Glencarne*, 7 Sawy. 202).

By the act of March 2, 1837 (5 Stats. 153, sec. 4236, R. S.), congress provided that—

“The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, may employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters, to pilot the vessel to or from such port.”

It is well known that this act grew out of the “pilot war” between New York and New Jersey, in which each state undertook to secure its pilots some exclusive privilege or advantage on the pilot ground in and about the mouth of the Hudson.

In the case of *The Panama* (1 Deady, 31), this court held that the territory of Washington is a “state” within the purpose and spirit of this legislation; and this ruling was followed in *The Ullock*, 9 Sawy. 641.

Assuming, then, that section 4236 of the revised statutes is applicable to pilotage on the Columbia river, the boundary between Oregon and Washington, this suit cannot be maintained.

As between the Oregon pilots, doubtless the regulation compelling the master of a vessel to take the pilot out of the

1886.]

Points decided.

river that brought him in, is valid and binding. But the state cannot compel a vessel in the Columbia river to take an Oregon pilot under any circumstances, or to pay him half or any pilotage, if the master prefers to, and does take a Washington pilot.

The matter is too plain for argument, and only needs to be stated, to be understood. The act of congress is paramount, and no regulation of the state can impair or limit its operation.

As applied to the facts and circumstances of this case, it declares in effect, that the master of any vessel, whether bound in or out of the Columbia river, may take a pilot from either Oregon or Washington, without any reference to the fact of which offered his services first, or whether either of them had served as pilot on the vessel before.

The libel is dismissed, and the respondent is entitled to a decree for costs and disbursements.

CIRCUIT COURT, AUGUST 23, 1886.

SAWYER, C. J. I think the view taken by the district judge is correct. I cannot add anything of importance to the observations made by him at the hearing in the court below. For the reasons given in the opinion of the district judge, the decree is affirmed.

IN RE THOMAS BALDWIN, ON HABEAS CORPUS.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MARCH 31, 1886.

1. CONSTITUTIONAL LAW—SECTION 5519, REVISED STATUTES.—The constitutionality of section 5519 of the revised statutes of the United States, so far as it embraces a conspiracy to deprive Chinese residents of any state, of the privileges and immunities secured to them by existing treaties, discussed, and a certificate of opposition of opinion between the judges granted.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

Opinion of the Court—Sawyer, C. J.

[March,

Mr. A. L. Hart, for the petitioner.

Mr. Hall McAllister and *Mr. J. W. Armstrong*, for the respondent.

SAWYER, Circuit Judge. The petitioner is in the custody of the marshal of this district, under a warrant issued by a United States commissioner, upon a charge of conspiracy with a number of other persons named, to deprive certain Chinese residents of the town of Nicolaus, but not citizens of the United States, of their right to reside, and pursue their lawful vocations in said town, and of actually depriving them of such right, by forcibly expelling them from their homes and from the town in pursuance of said conspiracy, thereby depriving them of their rights and privileges under the laws, and of the equal protection of the laws, guaranteed to them under our treaty with China. The charge is, apparently, founded upon section 5519 of the revised statutes of the United States, which so far as applicable to this case, provides that:

"If two or more persons in any state or territory conspire * * * *for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws,* * * * each of such persons shall be punished by a fine of not less than five hundred dollars, or more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months, nor more than six years, or by both such fine and imprisonment."

It seems to me, that there can be no doubt, that the acts charged are within the provisions of this section, and if the provisions, so far as they embrace Chinese aliens—subjects of the emperor of China—are constitutional and valid, that they constitute a very grave offense against the United States. So far as the provisions relate to the territories over which the United States have exclusive legislative power, there can be little doubt that the act is valid. (*National Bank v. Yankton*, 101 U. S. 129, 133). If invalid so far as the state is concerned, the provision as to the territories is easily severable, and it will be upheld so far to

1886.]

Opinion of the Court—Sawyer, C. J.

be valid. (*Packet Co. v. Keokuk*, 95 Id. 80, 89; *Presser v. Illinois*, 116 U. S. 253). But in *United States v. Harris*, 106 U. S. 629, this provision was held to be unconstitutional and void, so far as it applies to citizens of the United States, within a state. If that decision is applicable to the facts of this case, of course it is controlling, and the petitioner is unlawfully held, and must be discharged.

But the case of *Harris* depended, solely, upon the fourteenth amendment, which was held to be aimed only at state action, and did not apply to unlawful combinations of individual citizens against other citizens, acting wholly without color of law, or authority of the state. On that ground, alone, it was held to be unconstitutional—the provisions authorizing appropriate legislation to enforce the amendment, extending no further, than to protect the rights expressly provided for in the amendment. In this case, however, the Chinese aliens, against whom the conspiracy is aimed, do not rely upon the fourteenth amendment alone, or at all, except so far as the right to enjoy all the privileges and immunities of citizens and the equal protection of the laws, is implied from its provisions, recognizing the rights, by protecting them from hostile state legislation, upon the principles adopted in *ex parte Yarbrough*, 110 U. S. 652, 664, 665, and *United States v. Waddell*, 112 Id. 76, 80. They rely, mainly, upon other express provisions of the constitution. Art. 6 of the national constitution provides that, “this constitution and the laws of the United States which shall be made in pursuance thereof; and all *treaties* made, or which shall be made under the authority of the United States, shall be the *supreme* law of the land, and the *judges in every state* shall be bound thereby, *anything in the constitution, or laws of any state to the contrary, notwithstanding.*” Art. 1, sec. 10: “That no state shall enter into any treaty, alliance, or confederation.”

Art. 2, sec. 2: That the president “shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur,” and the last clause of section 8, article 1, that congress “shall have power to make all laws which shall be

Opinion of the Court—Sawyer, C. J.

[March,

necessary and proper for carrying into execution the foregoing powers, *and all other powers vested* by this constitution in the government of the United States, or in any *department or officer* thereof."

Thus the states have surrendered the treaty-making power to the general government, and vested it exclusively in the president and senate, and when duly exercised by the president and senate, the treaty resulting becomes the supreme law of the land, to which not only state laws, but state constitutions, are in express terms subordinated. As to what subjects are within the treaty-making power, see *Parrott's case*, 6 Sawy. 368, 369, and the numerous cases there cited. It certainly, under the authorities there cited, embraces the entire subject-matter of our treaties with China. The rights, privileges, and immunities guaranteed are within the treaty-making power to grant. They are created under, and are dependent upon the constitution of the United States. And in *United States v. Reese*, the supreme court holds that, "rights and immunities *created by, or dependent upon, the constitution of the United States, can be protected by congress*. The form and manner of protection may be such as congress in the legitimate exercise of legislative power, shall provide. This may be varied to meet the necessity of the particular right to be protected." (92 U. S. 217.) And in *Yarborough's case*, the supreme court say: "The power arises out of the circumstance that the function in which the party was engaged, or *the right which he is about to exercise, is dependent on the laws of the United States*. In both of these cases *it is the duty of the government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing.*" (110 U. S. 628; 112 Id. 80.) There is nothing in the suggestion of counsel that the Chinese, on this principle, are better off than citizens. It is presumed that the state will protect its own citizens, while long experience shows, that it will not always protect foreigners, against the prejudice and hatred of citizens. But whether the suggestion be true, or not, cannot affect the question; for the state has not, in this particular, surrendered the power of protecting its own

1886.]

Opinion of the Court—Sawyer, C. J.

citizens, among themselves, to the United States. It has, however, surrendered its power over the intercourse of its citizens with foreign nations to the general government. The relations between the United States and foreign governments are matters of international, not mere state, concern. The power to make treaties, and to grant rights, within the state, to aliens, under treaties, necessarily, involves the power to protect those rights when granted, either against the acts of the states, or the citizens of the several states. Without this power of protecting the rights granted to aliens by treaty, against hostile, local prejudices, the power to grant such rights would be utterly futile, and nugatory. Every right must have its remedy, or it is practically no right. The power to grant, without the power to protect, would be but in name, without the substance. It is necessary for the national government to be empowered to execute its own laws, and especially its treaty stipulations with other nations. Without this power it would be impossible to avoid giving good cause for wars. Hence, the power to protect the rights granted under treaties, as correlative to the power to grant, was fully vested in congress by the constitution. If this puts the Chinaman, as is said, in a better position than the citizen, so be it. The state has surrendered that power to the general government in the one case, while it has not done so in the other. It might as well be said that the alien, Chinese, or other nationality, is better off than the citizen, because the former can always sue a citizen in the national courts, while the latter cannot. There can be no doubt, that making the violation of any rights so secured by the constitution and treaties, "made under the authority of the United States," by a combination of individuals, a criminal offense against the nation, and punishable as such, as is provided by section 5519, is a proper mode of protection.

Such combinations to violate treaty rights are matters not merely of state, but of international concern, and may well involve questions of peace and war. By article 5 of the treaty called the Burlingame treaty, "the United States and the emperor cordially recognize the *inherent* and *inalien-*

Opinion of the Court—Sawyer, C. J.

[March,

able right of man to change his home and allegiance, and, also, the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for the purposes of curiosity, of trade, or as permanent residents." And article 6 further secures to Chinese residents "all privileges, immunities, and exemptions, enjoyed by the citizens and subjects of the most favored nation." (16 Stats. 740.) The amended treaty of 1880 adds the still more comprehensive word, "*rights*," to the words "privileges, immunities, and exemptions," and expressly provides that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord." And article 3 of the latter is as follows:

"If Chinese laborers, or Chinese of any other class, now either *permanently or temporarily* residing in the territory of the United States, meet with ill-treatment *at the hands of any other persons*, the government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same *rights*, privileges, immunities, and exemptions, as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty." (22 Stats. 827.)

Our treaty with Great Britain, still in force, will disclose what some of the right so secured to the Chinese by these treaties are. It provides that "the inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers in the territories aforesaid [of the United States and Great Britain in Europe] to which other foreigners are permitted to come, to enter into the same, and *to remain and reside in any parts of said territories, respectively.*" (Pub. Treat. 293, 299, 312.)

Thus, the United States government has, by these treaties, made in pursuance of the constitution and under the authority of the United States, imposed upon itself the express obligation "to exert all its power to devise means for their [Chinese residents] protection," and to secure them the "*rights, privileges, immunities, and exemptions*," to which they are entitled, where such Chinese residents meet with

1886.]

Opinion of the Court—Sawyer, C. J.

ill-treatment *at the hands of any other persons*," as well as in consequence of unfriendly legislation by the states. This right is not limited to state action, as the fourteenth amendment was held to be limited, but it is expressly extended to individual acts. Among those rights is the right to select a place for *temporary or permanent residence*, and to reside and pursue their lawful vocations at the places so selected. As to what the privileges and immunities secured are, see *Parrott's case*, 6 Sawy. 373, and cases cited; and *People v. Marx*, 99 N. Y. 386. Proper means for protecting these rights, certainly, include the enacting of criminal laws for enforcing, protecting, and securing the rights guaranteed by the treaties made in pursuance of the provisions of the constitution cited.

These Chinese residents of Nicolaus, therefore, had rights arising under, and dependent upon, the constitution of the United States, and the treaties made in pursuance thereof, between the United States and the emperor of China, which were violated by the acts charged, upon which the arrest was made, and rights, which it was competent for congress to protect by legislation in a proper form, under the clause cited, which authorizes it "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this constitution in the government of the United States or in any department thereof." And it was its imperative duty to protect such rights. Thus the case of the Chinese residents of Nicolaus is clearly distinguishable from that of United States citizens arising under the fourteenth amendment, considered in the case of *United States v. Harris*, *supra*, and rests upon other and further provisions of the national constitution. Had section 5519 been expressly limited in terms without including any other parties to a conspiracy for depriving, directly, or indirectly, *Chinese subjects* residing in the United States of the "equal protection of the laws," or of "equal privileges and immunities under the laws," guaranteed to them by the treaties, there could, scarcely, be a doubt I think, of its constitutionality and validity. If, therefore, it be void, as to the Chinese subjects affected by the acts charged, as well as to

Opinion of the Court—Sawyer, C. J.

[March,

similar acts, perpetrated upon citizens of the United States, it is only so, because congress has attempted to accomplish too much in the same section, by the use of language too comprehensive, including persons to whom these powers did not extend, and by so doing has vitiated the whole. It is not because the language does not include them, or for want of constitutional power, but for want of proper form in the provision—because it is too broad; simply because it it has “spread too large a net.” But Chinese subjects residing in the United States, under the stipulation of our treaties with China, constitute a separate, distinct, independent class, with distinctly defined and easily recognized limits; and it is not readily perceived, why the *class* may not be easily segregated and the provisions of the statute held constitutional and valid, and be fully enforced as to that class, even though void as to other persons and classes, relying on other provisions of the constitution, easily recognized, and without difficulty segregated.

Why should not the principle adopted in *Packet Co. v. Keokuk*, affirmed in *Presser v. Illinois*, at the present term of the supreme court, apply? The Chinese residents, under the treaty, may be regarded as a subject-matter entirely distinct from citizens of the United States. The provisions of the section as to the states, and as to the territories, operate, certainly, upon distinct subjects-matter, and the act, I take it, could, and would, be held valid under the authorities cited, as to the territories, even though void as to the states and their citizens. They are easily segregated, then why cannot the Chinese residents, as one subject-matter, be separated from citizens as another, upon similar principles?

The language of the court in *United States v. Harris* on this point should, doubtless, be considered with reference to the special facts of the case then in judgment. But still, it must be confessed, that it is very broad, and the rule laid down, may be intended to cover any case that can be brought within the terms of the statute. If so, of course, the ruling is authoritative and controlling in this court. But like congress, in the language of section 5519, may not the court

1886.]

Opinion of the Court—Sawyer, C. J.

also have, inadvertently, used language broader than the exigencies of the case before it required?

It is proper to observe, that in the case of Reese, there was a defect in the statute, and, also, in the indictment, in the omission of one constitutional element, or ingredient necessary to constitute the offense. Under the fifteenth amendment then in question, it was necessary that the discrimination should be "on account of race, color, or previous condition of servitude." *This essential element was omitted* in the act, and in the indictment, and the court could not perfect the statute or indictment by inserting it. It was with special reference to this omission, that the court made the observations in respect to separating the constitutional, from the unconstitutional, part of a provision so manifestly indefinite, afterward repeated in *United States v. Harris*, with reference to the thirteenth amendment. To the provisions and facts then under discussion, the observations seem to me to be more appropriate, than to the sections of the statutes, constitutional provisions, and the facts, as now presented. It must be remembered that section 5519, has thus far, only been considered by the supreme court, with reference to the authority conferred upon congress by the thirteenth, fourteenth, and fifteenth amendments relating to specific subjects-matter. It has never yet been considered with reference to the powers conferred by the more general and comprehensive clauses cited in this opinion from the constitution, as, originally, adopted. The difference between the cases is very obvious, and the result arising upon the different conditions may, and, it seems to me should, be entirely different.

The only difficulty I have, is, in satisfactorily determining, whether the rule indicated in *United States v. Harris*, or that in *Packet Company v. Keokuk*, and in *Presser v. Illinois*, *supra*, relating to the segregation of the constitutional from the unconstitutional parts of the section, should be applied to the facts disclosed in the petition, writ, and return in this case. I can perceive no practical difficulty in applying the rule adopted in the latter case. If there is none, it should be applied. The specific

Opinion of the Court—Sawyer, C. J.

[March.

question is one of vast consequence to the entire Chinese population of the United States, and of the utmost importance to the peace and good order of society, throughout the entire Pacific coast. It is of international consequence, involving the honor and good faith of the United States, and possibly the question of peace or war. If this section of the statute is valid, as to Chinese subjects residing in the United States, and embraces the acts set out in the petition and return, then the acts of all the public meetings throughout the land looking to, and providing for depriving Chinese subjects of the rights, privileges, immunities, and exemptions, secured to them by our treaties with China, by means, popularly known as "boycotting," or any other coercive means, no matter in what form, or through what channels applied, are criminal, and all those participating in them, must be subject to the very severe penalties denounced by the statute. I can perceive no way of escaping this conclusion. The depriving of persons of any of the rights protected, by any means, either "*directly or indirectly*," is prohibited. Where one has a lawful right to do any given thing, it would seem that no body of other persons can, properly or lawfully, combine or conspire together to use coercive means, in any form, to prevent him from doing that thing. The two rights are inconsistent, and cannot properly co-exist. It can make no difference in principle whether the coercion is applied by direct force, or by combined and concerted action, to prevent him from exercising his right, by depriving him of the means of procuring a livelihood, and thereby inducing starvation, or even less serious consequences.

If the statute in this particular is not valid, then there are no means now provided by congress of protecting Chinese subjects in the enjoyment of the rights secured to them by the treaties, through the criminal laws of the country, unless the acts are within the provisions of section 5508, or 5336, revised statutes, and if there is no statute covering the case, then the government has not yet fulfilled its treaty obligations under article 3 of the treaty of 1880. I shall not stop to discuss section 5508, and only remark that sec-

1886.]

Opinion of the Court - Sawyer, C. J.

tion 5336 provides that: "If two or more persons in any state or territory conspire to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof; *or by force to prevent, hinder, or delay the execution of any law of the United States*; or by force to seize, take, or possess any property of the United States, contrary to the authority thereof; each of them shall be punished by a fine of not less than five hundred dollars and not more than five thousand dollars, or by imprisonment with or without hard labor, for a period of not less than six months nor more than six years, or by both such fine and imprisonment."

A treaty, says the constitution, is a part of "the supreme law of the land." It has been insisted, that the acts set forth in the petition, constitute a conspiracy by force to prevent, hinder, or delay the execution of the treaty stipulations, or obstruct their operation, which, it is said, is equivalent to obstructing its execution, and, therefore, of obstructing the execution of a law of the United States. If this be so, then the acts charged constitute an offense against the United States under this section, as well as under section 5519. I am officially informed that thirteen persons have just been indicted under this section in one of the states of this circuit. But it seems to me that the acts are not so manifestly within the provisions of this section and section 5508 as within section 5519.

The specific questions now presented are questions of too vast consequence to be finally determined by a subordinate court. The peace and good order of the Pacific coast and the honor and good faith of the nation are involved and require that the question should be at once presented to and promptly decided by the supreme court of the United States.

The supreme court in *United States v. Harris*, *supra*, says: "Proper respect for a co-ordinate branch of the government, requires the courts of the United States to give effect to the presumption that congress will pass no act not within its constitutional powers. This presumption should prevail, unless lack of constitutional authority to pass the act in question is clearly demonstrated." (p. 635.)

Opinion of the Court—Sawyer, C. J.

[March,

If there be any doubt, then, as to the constitutional authority of congress to pass section 5519, in its present comprehensive form, so far as it embraces the specific facts disclosed in this case, which have not yet been considered by the supreme court, or as to the applicability of the observations of the supreme court in relation to separating the constitutional or unconstitutional parts of the act, to the specific facts now presented—the only point upon which I entertain any doubt—the doubt should be resolved, especially in this court, in favor of the validity of the statute in this particular, and the question be referred at once to the supreme court, to be authoritatively determined.

As there is doubt in my mind upon the point suggested under the authorities as they now stand, I shall for the present, and for the purposes of this case, rule against the petitioner, remand him to the custody of the marshal, and dismiss the writ.

I do not desire, however, to be considered as finally determining the question in such sense, that it may not be open for reconsideration, should the question be again presented in other cases, before an authoritative decision can be had in the supreme court.

My associate, though with doubt and hesitation, dissents from the rulings made, and a certificate of opposition of opinion will be made if either party desires it, and a writ of error to the supreme court allowed. In view of the circumstances and of the doubts entertained, should a writ of error be taken, the prisoner will be allowed to go at large on his own recognizance, until the decision on appeal. And in case the writ is pressed to an early hearing, it is suggested that the government do not prosecute other similar cases arising under the revised statutes, especially such as have already arisen, until an authoritative decision can be had.

Let the writ be dismissed, and the prisoner remanded to the custody of the marshal.

See same case, 120 U. S. 678.

1886.]

Points decided.

ELLIS G. HUGHES v. THE DUNDEE MORTGAGE AND TRUST
INVESTMENT COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 31, 1886.

1. **ACTION ON AN ENTIRE DEMAND.**—Where an action is brought on a part only of an entire and indivisible demand, the pendency thereof may be pleaded in abatement of another action on the remainder, and a judgment in either may be pleaded in bar of the other.
2. **CASE IN JUDGMENT.**—H. was appointed the attorney of the defendant—a foreign corporation engaged in loaning money in Oregon on note and mortgage—and on February 12, 1883, after being so employed about eight years, he brought an action against said corporation to recover the sum of twenty-one thousand two hundred and fifty-eight dollars and eighty cents, the alleged value of his services for that period, without specifying any particular service, except attending to two suits, for which he claimed the sum of seven hundred and fifty-five dollars and eighty cents, and had judgment therein for eight thousand four hundred and seven dollars and sixty-one cents and three hundred and ninety dollars and five cents costs and disbursements; and afterwards, on September 5, 1884, he brought this action against said corporation to recover the sum of eleven thousand two hundred and twenty-two dollars and seventy-four cents, with interest from January 31, 1880, for services as an attorney during the period covered by the former action in making and delivering to the defendant five hundred and fifty-four certificates of the title to lands offered to the latter as security for loans, the sum demanded being equal in amount to one per centum of the moneys loaned on the lands included in said certificates: *Held*, that the claim now sued for was a part of an entire and indivisible demand and cause of action existing when the former action was brought, and that the judgment therein is a bar to this action.
3. **ATTORNEY AND CLIENT.**—The services of a standing or regularly appointed attorney are usually rendered pursuant to some general agreement or understanding, and whatever is due therefor at the expiration of the service or employment constitutes but one cause of action; and courts should be careful in such cases, in the application of a rule against splitting up demands, not to leave any loophole through which an attorney may be tempted to harass and oppress his client with vexatious or spiteful litigation.
4. **JUDGMENT NOT SUSPENDED BY WRIT OF ERROR.**—A writ of error is in the nature of a new suit to set aside or annul a judgment for error of law apparent on the face of the record, and pending the same the judgment is in full force and effect as a bar or an estoppel.
5. **INCONSISTENT POSITIONS IN COURT.**—A party who takes a position in the course of a litigation is estopped to act inconsistently therewith, so long as the same is unretracted, and this includes the case of one who having

taken a judgment of this court against himself, to the supreme court on a writ of error, attempts, while said proceeding is still pending, to plead said judgment in bar of an action against himself by the plaintiff therein.

Before DEADY, District Judge.

Mr. Ellis G. Hughes, pro se.

Mr. Earl C. Bronnaugh, for the defendant.

DEADY, J. This action was commenced on September 5, 1884, to recover the sum of eleven thousand two hundred and twenty-two dollars and seventy-four cents, with interest from January 31, 1880, to date, amounting in all to fifteen thousand three hundred and fifty dollars and nineteen cents.

It is alleged in the complaint, that the plaintiff is a citizen of the state of Oregon, and the defendant is a corporation duly formed under the laws of Great Britain, having its principal office at Dundee, Scotland, and is now lawfully engaged in business in Oregon, and that the Oregon & Washington Trust Investment company was, from January 1, 1875, to January 31, 1880, a corporation also duly formed under said law, engaged in loaning money in Oregon and Washington on note and mortgage, with an agency at Portland. That during said period, plaintiff was a practicing attorney at law, resident at Portland; and at the request of said Trust Investment company, and for its use and benefit, did "make and issue to it in writing," five hundred and fifty-four separate certificates, whereby he became responsible to said corporation, that the title to the real property mentioned therein was in the party seeking a loan thereon; and that the same was free from all liens and incumbrances, for which service and responsibility said Trust Investment company "undertook and agreed to pay the plaintiff the reasonable value" thereof, which is one per centum on the amount of the loans made on said certificates, namely: one million one hundred and twenty-two thousand two hundred and seventy-four dollars; and that said Trust Investment company, on January 31, 1880, by reason of the issuing of said certificates, became and was indebted to the plaintiff in the sum of one per centum on said amount, namely: eleven thousand two hundred and twenty-two dol-

1886.]

Opinion of the Court—Dedy, J.

lars and seventy-four cents. That on January 31, 1880, said Trust Investment company amalgamated with the defendant, and assigned all its property thereto, in consideration whereof, the latter "did assume and agree to pay all and every of the debts and liabilities" of the former, including the debt due the plaintiff; but that neither of said corporations has paid the same, or any part thereof; and the whole is now justly due him from the defendant.

Among other defenses, the answer of the defendant contains the following:

The plaintiff ought not to have or maintain this action, because on February 12, 1883, he commenced an action against the defendant in this court, alleging in the complaint therein, that said Trust Investment company, did about January 1, 1876, appoint the plaintiff its attorney, to attend to its business in Oregon and Washington, pursuant to which the plaintiff did, between January 1, 1876, and January 1, 1880, render service in said corporation "in consulting and advising it about its business and other acts and attendances in and about said business, at its request, of the value of two thousand five hundred dollars per annum;" that about January, 1880, said corporation amalgamated with the defendant, who thereupon "assumed its indebtedness and liabilities, including its indebtedness to plaintiff," and that "thereafter the plaintiff rendered services to the defendant as its attorney, and paid out money for it, up to January 1, 1882," the value of which amounted to two thousand five hundred dollars; that it was also alleged in the complaint in said action that the defendant was indebted to the plaintiff for services in two certain lawsuits in the further sum of seven hundred and fifty-five dollars and eighty cents, and that the aggregate of defendant's liability to plaintiff on these several accounts was twenty-one thousand two hundred and fifty-eight dollars and eighty cents; that the defendant made a defense to the action, and on the trial thereof the plaintiff had judgment for the sum of eight thousand four hundred and seven dollars and sixty-one cents, and three hundred and ninety dollars and five cents costs and disbursements, which judgment remains in full force and effect.

It is then alleged in the defense that the service mentioned in the complaint herein was rendered before the commencement of said former action, and that whatever sum of money may be due the plaintiff for or on account of such service, was due prior to the commencement of said former action; and that all the service alleged in the complaint herein to have been rendered to the Trust Investment company and to this defendant was performed under an appointment of plaintiff, as the attorney of the Trust Investment company and this defendant, as alleged in the complaint in said former action, wherefore the defendant says that the plaintiff is "by said former judgment forever barred from recovering herein."

To this defense the plaintiff demurs, for that it does not contain facts sufficient to constitute a defense; and the point relied on in the argument in support of it, is "that it does not appear that the claim or account of the indebtedness of the Trust Investment company made in the former action was placed (put) in issue, litigated or passed into judgment therein."

The point was also made that the judgment in the former action was suspended by operation of the writ of error sued out thereon by the defendant, but was afterwards specially withdrawn.

In support of the point, the plaintiff cites 1 Tidd's Prac. 685; *Russel v. Place*, 94 U. S. 610; and Bigelow on Estop. 587-9.

It is apparent from this, that the plaintiff has misconceived the nature of this plea or defense. It is not, as he appears to think, a plea of a former recovery or adjudication of the claim sued on here, and that therefore it must show with the certainty required in pleading an estoppel, that such claim was made and passed on in said former action.

But the defense is a plea that the plaintiff brought a former action on the same cause of action—the same contract or account—by reason of which he is barred from maintaining another action thereon or any part thereof, although such part may not have been actually set up in the other action.

This defense is not an estoppel, but a bar, founded on a rule of public policy, as just and expedient as the statute of limitations. This rule declares, that no one ought to be twice vexed for the same cause—*Nemo debet bis vexari pro eadem causa*. It assumes that it is better that a plaintiff who wantonly or negligently splits a claim into parts, for the purpose of suit, should lose one of them, than that the adverse party should be needlessly harassed by litigating in detail, matters that could and should have been determined in one action.

As was said by Mr. Justice Nelson, in *Guernsey v. Carver* 8 Wend. 494: "The law abhors a multiplicity of suits." And therefore, if a party bring an action on a part only of an entire and indivisible demand, the pendency thereof may be pleaded in abatement of another action on the remainder, and a judgment in either may be pleaded as a bar of the other. (*Bagot v. Williams*, 3 Barn. & Cres. 235; *S. C.* 10 Com. Law, 115; *Logan v. Caffrey*, 30 Pa. St. 196; *Warren v. Comings*, 6 Cush. 103; *Lucas v. Le Compte*, 42 Ill. 303; *Farrington v. Payne*, 15 John. 432; *Guernsey v. Carver*, 8 Wend. 492; *Bendernagle v. Cocks*, 19 Wend. 207; *Beekman v. Platner*, 15 Barb. 551; *The Reformed P. D. Church v. Brown*, 54 Barb. 191; *Secor v. Sturgis*, 16 N. Y. 548; *Baird v. U. S.* 96 U. S. 430; *Beloit v. Morgan*, 7 Wall. 623; *Stark v. Starr*, 94 U. S. 485.)

In *Secor v. Sturgis*, *supra* (554), it is said: "The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only a part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment on the merits in either will be available as a bar in the other suits."

In *Baird v. U. S.*, *supra* (432), Mr. Justice Waite, speak-

ing for the court, says: "It is well settled that, where a party brings an action for a part only of an entire and indivisible demand, and recovers judgment, he cannot subsequently maintain an action for another part of the same demand. (*Warren v. Comings*, 6 Cush. 103). Thus, if there are several sums due under one contract, and a suit is brought for a part only, a judgment in that suit will be a bar to another action for the recovery of the residue." (See, also, to the same point, *Bendernagle v. Cocks*, *supra*, 215).

Occasionally, the application of this rule involves a nice question.

The case of *Secor v. Sturgis*, *supra*, may be taken as one, that leans, if at all, to the plaintiff's side of the question.

Three brothers, under the name of Chas. A. Secor & Co., carried on the business of ship carpenters and chandlers in a house in New York; the former being conducted on one floor thereof, under the management of two of the parties, and the latter on another floor, by the third one. Separate books of account were kept of the two departments, and separate bills rendered therefor. Under these circumstances, carpenter work and articles of ship chandlery were done and furnished to the brig *Leverett*, for the defendant.

The court held that the demands were distinct; and that a judgment in an action for one of them was no bar to an action on the other.

In the course of the opinion it was said: "The true distinction between demands or rights of action which are single or entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps, as simple and safe a test as the subject admits, by which to determine whether a case belongs to one class or the other is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass or conversion or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or im-

1886.]

Opinion of the Court—Deady, J.

plied, each contract affords one and only one cause of action."

The case of *Baird v. U. S.*, *supra*, arose on a contract to furnish the United States fifteen locomotive engines in 1864, at a fixed price, with the addition of any advance that might take place in the cost of labor and materials used in their construction after November 9, 1883, and any damage resulting from the preference given in this order over other contracts. The engines were duly delivered and the fixed price paid. A claim was also presented for the advance in labor and materials, which was audited, and about two-thirds thereof allowed and paid. Subsequently an action was brought in the court of claims for the damages sustained in giving preference to the government order, in which judgment was given against the United States. On May 2, 1870, another action was brought in the court of claims to recover the "residue of the amount of the advance in labor and materials," in which, although the court found that the advance over and above the amount paid, was the sum claimed, there was judgment for the defendant. Thereupon the claimant appealed to the supreme court, where the judgment was affirmed, the court holding that the claims for construction, advance and damage were all embraced in one contract, and constituted but one demand and cause of action. In the course of the opinion, Mr. Justice Waite said: "Here was a contract by which the government was bound to pay for the engines in accordance with terms agreed upon. The entire price to be paid was not fixed. A part was contingent, and the amount made to depend upon a variety of circumstances. When the former action was commenced in the court of claims, the whole was due. Although different elements entered into the account, they all depended upon and were embraced in one contract. The judgment, therefore, for the part then sued upon, is a bar to this action for the 'residue.'"

In the *Reformed P. D. Church v. Brown*, *supra*, the defendant's testator had agreed in writing to pay the sum of one hundred dollars a year for the support of a minister of the gospel in the township of Westfield, Staten Island. At

the testator's death four years' subscription were due on the writing, on which nothing had been paid. The plaintiff then sued the defendant, as executor, for the first one hundred dollars due on the writing, and had judgment therefor; and on the day following brought an action to recover the remaining three years' subscription. The court held that the judgment in the first action was a bar to the second one, saying; "In order to avoid multiplicity of actions, the law forbids that a cause of action shall be split up for the purpose of bringing several actions. But when several claims payable at different times arise out of the same contract or transaction, separate actions can be brought as each liability enures. Still, however, if no action is brought until more than one is due, a recovery on the one first brought will be an effectual bar to a second action brought to recover the other claims that were due when the first was brought."

Taking the application of the rule, as made in these cases, it is clear that the plaintiff's demand or cause of action against the defendant for services rendered the Trust Investment company, as an attorney, and the demand or cause of action for similar services rendered itself, were, as they existed on February 12, 1883, the day on which the former action was commenced, entire and indivisible.

Shortly, it appears from the plea, that the plaintiff alleged in the former action, as the cause thereof, that he was appointed or employed as the standing attorney of the Trust Investment company from January 1, 1876, to January 1, 1880, when it was merged in the defendant, for whom he continued to act in the same capacity until January, 1882.

Assuming, as I have, that there was a distinct contract or employment by each corporation, though much might be said, if it was material, in support of the proposition, that the service of the plaintiff was a continuous one, the latter corporation being in fact the legal prolongation of the other, still the plaintiff's demand or cause of action for the service rendered each corporation was an entire and indivisible one. Both these demands were joined in the action of February 12, 1883, and whatever was then due from the defendant on account of such services was a part of the causes of action on which said action was brought.

If the plaintiff then had a claim against the defendant for services as an attorney, as alleged herein, it was a part of his cause of action, and should have been included therein. For, if he could divide the account into advice and counsel, attending suits in court, preparing certificates of title, so as to make three causes of action out of the transaction, there is nothing but his own temerity or sense of propriety to prevent him from subdividing it *ad infinitum*, so as to have a separate cause of action for each item of advice or the five hundred and fifty-four certificates of title mentioned in his complaint. By such means the plaintiff might make for himself, out of a comparatively short service, almost a perennial cause of action.

In the consideration of this case I have constantly had in mind the fact that the claims made by the plaintiff against the defendant grow out of the employment of the former by the latter as its attorney. In the nature of things, the services of a standing or regularly appointed attorney are usually rendered pursuant to some general contract or understanding, and whatever is due therefor at the end of the service or employment constitutes but one cause of action, and cannot be split up into several distinct ones. (*Lucas v. Le Compte*, 42 Ill., 303.)

In the application of the salutary rule against splitting up demands, courts ought to be careful to leave no loophole, through which a discarded attorney may be tempted to harass and oppress his client with vexatious or spiteful litigation. Such things are well calculated, not only to bring the profession of the law into disfavor but the administration of justice into disrepute.

The demurrer is sustained.

SAME v. SAME. SAME v. SAME.

These two cases were argued and submitted with the foregoing. The facts in the cases are similar and the question made on the demurrers to the defenses is the same.

In the first one it appears, that the Oregon and Washington Mortgage Savings Bank, was incorporated under the

laws of Great Britain and engaged in loaning money in Oregon and Washington; that the plaintiff was its attorney and as such prior to January 1, 1882, made and delivered to it, three hundred and forty-seven certificates of titles to certain lands, on which it loaned five hundred and sixty-five thousand and one hundred and three dollars and fifty-nine cents; that said certificates were worth one per centum of that sum or five thousand six hundred and fifty-one dollars and three cents; that in August 1882, said corporation amalgamated with the defendant, who assumed to pay its debts, including the claim of the plaintiff, which with interest, amounts to six thousand nine hundred and seven dollars and seven cents.

In the second one it appears that the defendant was incorporated under the laws of Great Britain prior to 1879, and has since been loaning money in Oregon and Washington; that in 1879, 1880 and 1881, the plaintiff was the attorney of the defendant, and as such made and delivered to it two hundred and ninety-seven certificates of title to certain lands, on which it loaned five hundred and eighty-nine thousand dollars; that said certificates were worth one per centum of that sum, or five thousand eight hundred and ninety dollars, which with interest thereon amounts to seven thousand one hundred and thirty-nine dollars and eight-five cents.

In both these cases the defense is made that the judgment given in the action commenced February 12, 1883, is a bar, to which the plaintiff demurs.

The defenses are sustained and the demurrers overruled for the reasons given above.

JULY 12, 1886.

DEADY, J. This case was before this court on March 31st, on a demurrer to the fifth defense to the action, alleging a former action and judgment therein, between the same parties, for the same cause of action, when the demurrer was overruled.

It is now before the court on a motion to strike out certain parts of the replication, including the third reply to

1886.]

Opinion of the Court—Deady, J.

said fifth defense, and a demurrer to the reply to the fourth defense, and the first and second replies to said fifth defense.

The motion to strike out the allegations in the replication numbered from 1 to 9 inclusive, and the third reply to the fifth defense, is allowed. The motion to strike out the allegation numbered 10 is disallowed.

The first allegation, is an immaterial qualification of a denial that the plaintiff ever advised defendant, as to its amalgamation with the Oregon & Washington Trust Investment company; the second, third and fourth ones are statements of fact, evidentiary in their character, tending to show that the defendant knew the relations between the plaintiff and said trust company and the liability of the latter to him for services rendered as alleged in the complaint; the fifth one is to the effect, that said trust company was solvent at the time of said amalgamation, and that the plaintiff had no interest to promote the same; the sixth, seventh and ninth ones are parts of the first reply to the fifth defense and are conclusions of law merely. The tenth one is what is left of said reply, and is now a mere denial of the alleged bar of the former judgment.

The third reply to the fifth defense is to the effect, that at the time of bringing the former action mentioned in said fifth defense the plaintiff did not know that he had the claim set forth in the complaint herein, or that the same existed, until issue was joined in said former action. Apparently this is a sham reply, and whether so or not, it is certainly immaterial. If this claim is a part of the cause of action or claim on which the former action was brought, as alleged in said fifth defense, it makes no difference, so far as such defense is concerned, whether the plaintiff was then aware of its existence or not.

The fourth defense alleges that the making of each of said certificates of title was a separate and distinct transaction, and that eight thousand eight hundred and nineteen dollars and seventy cents of the claim made for such service accrued more than six years before the commencement of this action, which is therefore so far barred by the lapse of time. The reply thereto is merely a denial of the facts set up in

the defense concerning the making of these certificates and that eight thousand eight hundred and nineteen dollars and seventy cents of the claim therefor accrued more than six years before the commencement of this action. The demurrer to this reply is overruled.

The first reply to the fifth defense is a confession and avoidance of the same—the matter of avoidance being, that within ten days from the entry of the judgment in said former action and before the commencement of this one, the defendant “removed said cause,” by a writ of error, to the supreme court of the United States, alleging that the judgment therein was erroneous and contrary to law and ought to be reversed; and that said defendant gave the proper bond and caused said writ of error to become a *supersedeas*, and the same is still pending in said supreme court, wherefor said judgment is not a final one nor a bar to the maintenance to this action.

In his argument in support of this reply the plaintiff has gone over much ground and collated many authorities touching the subject.

Briefly, the argument is: (1) A judgment of the circuit court, to which a writ of error lies from the supreme court, is not, in the nature of things, a *final* judgment, that can have the effect of a bar or an estoppel—the proceeding in the supreme court on the writ of error being merely a continuance of that in the circuit court; and (2) irrespective of the effect of the writ of error in the premises, under section 505 of the code of civil procedure, which provides that an action is deemed to be pending until its final determination on appeal, or the time for an appeal has expired, a judgment of the circuit court cannot be pleaded as a bar or an estoppel during the pendency of a writ of error thereon or until the time for taking such writ expires.

This question has been heretofore considered by me in *Sharon v. Hill*, *ante*, and *Oregonian Ry. Co. v. Oregon R. & N. Co.*, *ante*, and a contrary conclusion reached.

In speaking of the original modes of reviewing a judgment in an action at law and a decree of a court of chancery or admiralty, it was said in *Sharon v. Hill*, *supra*: “A

1886.]

Opinion of the Court—Deady, J.

judgment in an action at law could only be reversed and annulled for error appearing on its face. For this purpose a writ of error issued out of the court above, to bring up the record for examination. This was considered a new action to annul and set aside the judgment of the court below; and if the writ was seasonably sued out and bail to the action put in, it was a *supersedeas*, so far as to prevent an execution from issuing on the judgment, pending the writ of error, but left it otherwise in full force between the parties, either as a ground of action, a bar or an estoppel. (2 Bac. Abr. 87; 3 Blackstone, 406; *Railway Co. v. Twombly*, 100 U. S. 81.) But in the equity and admiralty courts the remedy for an erroneous decree is an appeal, which removes the whole case into the court above, for trial *de novo*. There is no decree left in the lower court, and pending the hearing on appeal there is no decree in the case, and there can be no estoppel by reason thereof."

In the case of *Railway Co. v. Twombly*, *supra*, the matter is not discussed, but disposed of by the simple statement of the rule that a judgment taken to an appellate court on a writ of error, is not thereby vacated, but "continues in force until reversed."

In pursuance of a statute of Colorado, Twombly obtained a judgment against the railway company for damages for causing the death of her husband, which was affirmed in the supreme court of the territory. The record was then taken to the supreme court of the United States on a writ of error from that court, and pending this proceeding therein, the statute authorizing the widow to maintain the action was repealed. On this account the court, on the hearing, was asked to instruct the court below "to dismiss the suit," as there was no longer any statute under which it could be maintained, for the reason that in error, as on appeal, the determination of the court below is vacated and the case is pending for re-trial in the court above.

In disposing of the case, after stating there were no errors in the records affecting the judgment, Mr. Chief Justice Waite said: "Neither can we, as is asked, send the

case back to the court below, with instructions to enter a judgment of non-suit, because, since the judgment below, and while this writ of error has been pending, the statute authorizing the action has been repealed. A writ of error to this court does not vacate the judgment below. That continues in force until reversed, which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition. Here there are no such errors. All we can do, therefore, is to affirm the judgment, and send our mandate to that effect to the court below." (See also on this point *Sage v. Harpending*, 49 Barb. 174; *Harris v. Hammond*, 18 How. P. 123; *Nill v. Comparet*, 16 Ind. 107; *Curtis v. Donnel*, 3 Montana, 214; *Fredericks v. Clark*, Id. 260.)

But the contrary rule obtains in an appeal, as is clearly stated in the case of the *Schooner General Pinkney and cargo*, 5 Cranch. 281.

This vessel was condemned in the circuit court for the violation of a statute prohibiting intercourse with certain ports in St. Domingo. The case was taken to the supreme court of the United States by appeal, and before it was heard there the statute expired by its own limitation.

Counsel for the government claimed an affirmance of the decree of the court below, notwithstanding the lapse of the statute in the meantime, as if it was a case of a common law judgment in the appellate court on error. But the court held otherwise, Mr. Chief Justice Marshall saying: "The majority of the court is clearly of opinion, that in admiralty cases, an appeal suspends the sentence altogether; and that it is not *res adjudicata* until the final sentence of the appellate court is pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. * * *

The court is therefore of opinion, that this cause is to be considered as if no sentence had been pronounced; and if no sentence had been pronounced, it has long been settled on general principles that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted for violations of the law, committed while it was in force,

1886.]

Opinion of the Court—Deady, J.

unless some special provision be made for that purpose by statute."

In each of these cases the right to maintain the action depended on a statute, which in the one case was repealed and in the other expired after the determination of the cause in the court below and prior to the giving of judgment in the appellate court. But, owing to the difference in procedure, and the difference in the effect of that procedure, on the determination of the court below, a directly opposite result was reached. In the one case the action had, so far, ended in a judgment which continued in force, notwithstanding the writ of error, and therefore it did not fall with the repeal of the statute. It was no longer an action pending, but a *fait accompli*.

Nor does the case of *Cohens v. Virginia*, 6 Whea. 405, teach anything to the contrary of this.

That was a writ of error from the supreme court to a court of Virginia for the purpose of examining a judgment of the latter, given in a case in which the state was the plaintiff. Counsel for the state, relying on the technical rule, that a writ of error is a proceeding in the nature of a new action and not a mere continuation of the one in which the judgment was given, contended that under the eleventh amendment, which provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity *commenced or prosecuted* against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state," the court had no jurisdiction in the premises.

But the court held that the "suit" mentioned in the amendment was a proceeding *commenced* against a state by an individual "for the purpose of establishing some claim against it by the judgment of a court;" and that a suit commenced by a state against an individual, the final record of which in due course of law is transferred to or brought before the supreme court, "not for the purpose of asserting any claim against the state, but for the purpose of asserting a constitutional defense against a claim made by a state," does not thereby become a suit "*commenced or prosecuted*" against such state, within the purpose of the amendment.

And in conclusion (p. 412), Mr. Chief Justice Marshall says: "It is, then, the opinion of the court that the defendant who removes a judgment rendered against him by a state court into this court, for the purpose of re-examining the question whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the state, whatever may be its opinion, when the effect of the writ may be to restore the party to the possession of a thing which he demands."

At common law a writ of error is the mode of proceeding by which a court exercises appellate jurisdiction over the judgment of an inferior court given in an action at law. The action is not retried, as on an appeal proper. The record of proceeding is simply examined for the purpose of ascertaining if there is any error in law therein. The writ is a commission by which the judges of the appellate court are authorized to examine the record of the lower court and affirm or reverse its judgment, according to law. (*Cohens v. Virginia*, 6 Whea. 409.) And while it may not be an original "suit," in the sense in which that term is used in the eleventh amendment, which was intended to prevent individuals from asserting claims against a state in the national courts or otherwise than as it might allow, it is in no sense a mere continuance or prolongation of the action, the judgment in which, it is brought to review. In this respect it is similar to a suit in equity to set aside a judgment between the same parties in an action at law; and like it, it is so far an original, adverse, corrective proceeding, the mere bringing of which in no way modifies the force and effect of the judgment in question.

But the plaintiff insists that the latter part of section 505 of the code of C. P., which declares that an action shall be deemed pending until its final determination on appeal, is by virtue of section 721 of the revised statutes, which declares that the laws of the state, except where the law of the United States otherwise provides, shall be a rule of decision, in trials at common law, in this court, in cases where they apply, is applicable to this case; and that by virtue thereof the former action between these parties is now pending in

the supreme court of the United States, and the judgment of this court therein is suspended and of no force, either as a bar or an estoppel between the parties thereto.

Section 691 of the revised statutes provides that: "All *final* judgments of any circuit court," when the matter in dispute exceeds a certain amount, "may be re-examined and reversed or affirmed in the supreme court upon a writ of error."

The judgment in question was removed to the supreme court under this section. At common law and in contemplation of this statute it was a "final" one. The action terminated with it, and therefore it was no longer pending anywhere at all. Moreover, no appeal could be taken from this judgment. By the law of the United States it could only be reviewed on a writ of error, and then only for error in law apparent on the face of the record. (Rev. Stat., secs. 691, 1011.)

Admitting then, that the force and effect of the judgment in the former action between these parties is, under section 721 of the revised statutes, to be ascertained by reference to the law of the state, where the same applies, this appears to be a case in which such law does not apply. It does not apply, because the judgment cannot be the subject of an appeal, and because its review in the appellate court is otherwise provided for by the law of the United States.

The demurrer to this reply is sustained.

The demurrer to the third reply to the fifth defense raises the question, is the defendant estopped to assert the validity and binding force of the judgment in the former action after having removed the same to the supreme court on the allegation that it is erroneous and ought to be reversed. Or, more correctly speaking, is the defendant *precluded* from pleading this judgment as a bar to this action while he is seeking to reverse the same on error in the supreme court.

It is well settled that the law will not allow parties to assume inconsistent positions in the trial or the progress of a cause. And when two or more inconsistent courses are open to a party he must elect which, if either, he will pursue, and thereafter he is precluded or estopped from resorting to

the other. For instance, a party cannot claim the benefit of a judgment and at the same time maintain an appeal from it. (*Kelly v. Bloom*, 17 Abb. P. 229; *Bennett v. Van Syckle*, 18 N. Y., 483; *Lentz v. Lamplug*, 12 Pa., 346; *Eaton's Appeal*, 83 Pa. St., 155; *Vail v. Remsen*, 7 Paige, 206.)

In discussing the question of "inconsistent positions in court" Mr. Bigelow says (Big. Estop., 601): "It may accordingly be laid down as a broad proposition that one who has taken a particular position in the course of a litigation must, while that position remains unretracted, act consistently with it."

When the defendant pleads this judgment in bar of this action, the act is certainly inconsistent with the pending proceeding heretofore instituted by it to have the same set aside as being erroneous. There can, it seems to me, scarcely be a doubt as to this. It is clear, both on reason and authority, that if the judgment had been in its favor, it could not maintain a writ of error to reverse it and also an execution to enforce it. But setting it up in bar of this action is a mode of enforcing it or making use of it, that may be quite as beneficial, as an execution thereon. In the one case it is used as a sword and the other as a shield, but in either, as a valid judgment that the defendant by its act adopts and affirms as lawful and just. Yet either of these proceedings is equally a direct contradiction of the allegation that the judgment is erroneous and illegal, and on which the defendant is now seeking to have it annulled and held for naught.

It may be said that these inconsistent positions have not been taken in the same proceeding, and therefore they do not affect one another, and the rule does not apply. It is literally true that the writ of error was not taken in the action in which the judgment is pleaded in bar. But both acts have relation to the same judgment and occur in the course of the litigation between the same parties concerning the same subject matter or demand—the claim of the plaintiff for compensation for services alleged to have been rendered the defendant as an attorney.

It is admitted that no case has been cited or found that is

1886.]

Opinion of the Court—Deady, J.

directly in point. However, in my judgment, the general rule formulated by Mr. Bigelow, and cited herein, as well as the current of the authorities given in chapter 24 of his work on estoppel, include this case.

For instance, in *Glover v. Benjamin*, 73 Ill. 42, it was held that a party who caused a decree, which properly protected his interest in the subject of the suit, to be reversed, on the ground that it was given without his consent or request, was estopped to complain of a second decree, in which such interest was left unnoticed.

And in *Railway Co. v. McCarthy*, 96 U. S. 267, Mr. Justice Swayne, in speaking of an attempt of the railway company on the hearing in the supreme court, to excuse itself for the non-performance of a contract to carry certain cattle, on the ground that the act would have been a violation of the Sunday law of West Virginia, when it appeared that on the trial in the court below it had relied on the fact that it was impossible to forward the cattle on Sunday for the want of cars, said:

"This point was an after-thought, suggested by the pressure and exigencies of the case.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from so doing by a settled principle of law."

On the whole I am of the opinion that the demurrer to this reply is not well taken and should be overruled; and it is so ordered.

SAME v. SAME. SAME v. SAME.

SAME v. SAME.

These three cases were argued and submitted with the foregoing one.

In the first one, the plaintiff claims five thousand six hundred and fifty-one dollars and three cents, with interest from

Points decided.

[April,

January 1, 1882, for making three hundred and forty-seven other certificates of title for said Trust company.

In the second one, he claims five thousand eight hundred and ninety dollars, with interest from the same date, for making two hundred and ninety-seven certificates of title for the defendant.

In the third one, he claims eight thousand eight hundred and thirty-nine dollars, with interest from January 30, 1880, for services in paying out and delivering for said Trust company two hundred and sixty-two thousand eight hundred and sixty-six dollars on three hundred and twenty-two loans made by it before that time.

In each of these cases the defendant pleads the judgment in the former action between the parties as a bar, to which the plaintiff makes the same replies. The questions arising on the motion to strike out portions of the replication and the demurrers to the replies therein are the same as in the principal case, and are disposed of accordingly for the reasons therein given.

THE OREGONIAN RAILWAY COMPANY v. THE OREGON
RAILWAY AND NAVIGATION COMPANY. SAME v.
SAME. SAME v. SAME. SAME v. SAME.

CIRCUIT COURT, DISTRICT OF OREGON.

APRIL 16, 1886.

1. SHAM, REDUNDANT AND IMMATERIAL ALLEGATIONS IN ANSWER.—(1) An allegation in an answer denying knowledge of a matter alleged in the complaint, will not be stricken out as sham, unless it appears that the same must be false: (2) An allegation in a complaint that the plaintiff, a British corporation, "is a citizen of Great Britain," is meaningless and immaterial, and so is a denial of the same in the answer: (3) It is not necessary that a corporation formed under the law of Great Britain, to construct, own, operate and lease railways in Oregon, should specify in its memorandum of association, the termini thereof, and therefore an allegation in an answer to a complaint in an action by such a corporation on a lease of its road, that it had not made such a specification, is immaterial: (4) An allegation of fact in an answer which is not *per se* a defense to the action and is not attempted to be made so, by any proper averment, is im-

1886.]

Points decided.

material: (5) A mere denial of the lessee corporation's power to execute a lease of a railway in an action thereon, by the lessor corporation to recover rent, is a conclusion of law and immaterial: (6) An allegation by the lessee corporation in such action that the lessor's road had no near connection with its road, that the capital stock of the latter was not contributed to operate leased roads, that the lease was not ratified by its stockholders, or that it was signed by its president and secretary without the state of its origin, is immaterial: (7) In an action by the lessor to recover the rent reserved in a lease, an allegation in the answer to the complaint, that the lessee did not occupy the premises during the period for which the rent is demanded, is immaterial, unless it is further alleged that such non-occupation was the direct result of the fault or misconduct of the lessor.

2. **ESTOPPEL BY CONTRACT.**—In an action by an apparent corporation on a lease of its railway, to recover an installment of the rent reserved therein, the lessee is estopped to deny the lessor's corporate existence or power to make such contract.
3. **CONTRADICTIONARY ALLEGATIONS.**—When a denial of knowledge concerning a matter alleged in the complaint is followed by a direct averment necessarily implying such knowledge, either the denial may be stricken out as sham or the averment as redundant.
4. **JUDGMENT ON DEMURRER AN ESTOPPEL.**—Judgment on a demurrer to a complaint is as conclusive and binding on the parties to the action as to all matters well pleaded therein, as though it was given on a verdict on an issue arising on a denial of the allegations of the complaint; and if final judgment is given for the plaintiff on a demurrer to an answer, such judgment is a conclusive determination between the parties of the questions involved in the defense made by such answer, and of the material matters stated in the complaint.
5. **JUDGMENT—ESTOPPEL OF.**—A judgment is an estoppel in an action between the parties thereto as to any fact or matter determined thereby.
6. **ESTOPPEL BY JUDGMENT IN AN ACTION ON LEASE FOR RENT.**—A covenant in a lease of a railway for a number of years, to pay the rent reserved therein in semi-annual installments is in the nature of a series of undertakings or obligations assumed or incurred at the same time and under the same circumstances, and a judgment in an action to recover any one of these installments of rent is conclusive of the validity of the lease and the liability of the lessee thereunder, in any subsequent action thereon as to any matter or defense that might have been made to the first action.
7. **WRIT OF ERROR—EFFECT OF ON JUDGMENT.**—A writ of error from the supreme to the circuit court is not a proceeding under the state code, but at common law, as modified by the revised statutes, and it does not have the effect, pending the proceeding, to suspend the operation of the judgment of the circuit court as a bar or an estoppel.

Before DEADY, District Judge.

Mr. Earl C. Bronaugh for the plaintiff.

Mr. Charles B. Bellinger for the defendant.

Opinion of the Court—Deady, J.

[April,

DEADY, J. These actions are brought by the plaintiff, a corporation alleged to have been formed in Great Britain under "the companies act of 1862," against the defendant, a corporation formed under the Oregon corporation act of the same year.

They are brought on the covenants in a lease alleged to have been executed on August 1, 1881, by which the former demised to the latter its railway in Oregon for the term of ninety-six years, upon a rental to be paid in advance, in semi-annual installments, of sixty-eight thousand one hundred and thirty-one dollars, on May 15th and November 11th, together with the further sum at the same times, of one thousand four hundred and fifty-nine dollars and ninety-five cents for the purpose of paying the expense of keeping up the lessor's organization.

The first three actions are brought to recover three several installments of rent falling due on November 11, 1884, May 15, and November 11, 1885, and the fourth one to recover the installment of the expense money falling due on November 11, 1885.

The first two of the actions were commenced on March 18, 1885, and on November 7th there were amended complaints filed in each of them. The last two were commenced on November 28th, and they were all heard on December 30th and January 2d thereafter, on (1) motions to strike out parts of the answers as "sham, frivolous, irrelevant, immaterial and redundant;" (2) demurrers to so much of the answers as denies the corporate existence of the plaintiff, and its right to have and exercise the powers and privileges claimed by it; and (3) demurrers to the second and third replies of former adjudications of certain matters between the same parties, in reply to certain defenses set up in the answers.

The answers in these cases are alike, except in the last two, there is defense of a former adjudication set up in bar. They are all specimens of what may be called the conglomerate style of pleading, in which denials and other matters, having no legal or logical connection with one another, are run together so as to form a continuous statement, instead

1886.]

Opinion of the Court—Deady, J.

of being pleaded separately as distinct defenses, in the manner required by section 72 of the code.

But the plaintiff, instead of moving to strike out the answers on this account, as it might (code, sec. 81), has undertaken to purge them of sundry clauses and statements, and has demurred and replied to the remaining portions thereof, distinguishing them by their character.

The motions to strike out include fourteen portions or clauses of the answers.

The first one is a denial of the allegation in the complaint that the plaintiff "is a citizen of Great Britain." The complaint alleges that the plaintiff is a foreign corporation, formed under the laws of Great Britain; and adds, "is a citizen of Great Britain."

As there are no "citizens" of Great Britain; and as the allegation that the plaintiff is a foreign corporation formed in and under the laws of Great Britain, is sufficient to show that it is in contemplation of law an alien, and therefore entitled to sue in this court, this allegation, as to its citizenship, is a meaningless and immaterial one, and so is the denial. The only proper response to it was a motion to strike out. Besides, matter in abatement, as that the plaintiff is not a corporation or citizen, as alleged in the complaint, must be set up in a separate plea, and if pleaded with any other defense, is deemed waived. (C. C. Rule 40; *Sheppard v. Graves*, 14 How. 509.)

The second clause is an allegation that the plaintiff has not specified in its memorandum or articles of association, the termini of the road it was incorporated to construct, lease or operate in Oregon.

This allegation is based on the assumption that subdivision 6 of section 4 of the Oregon corporation act (Or. Laws, 525), which provides that the articles of incorporation, formed thereunder to construct a road, shall specify the termini thereof, applies to a foreign corporation, formed to construct a railway in Oregon. But the validity of the organization of a corporation is to be determined by the law of the place of its formation. In the exercise or assertion of its corporate power in Oregon, a foreign corporation may

be required to conform to the law of the state concerning the conduct of corporations, but the sufficiency of its incorporation must be tested by the law of the place of its origin. And this is not all.

By the act of October 20, 1880 (Sess. L. 56), "the plaintiff was directly recognized as an existing corporation, lawfully engaged in the construction and operation of a railway in Oregon from 'Portland to the head of the Wallamet valley.'"

The effect of this act is to establish the legal right of the plaintiff to construct and own the road in question, and in my judgment to dispose of the same. (*Oregonian Ry. Co. v. Oregon R. & N. Co.*, 10 Sawy. 481.)

The third clause is a denial of any knowledge whether the plaintiff's memorandum of association specifies the purpose of its incorporation as alleged in the complaint. This is moved against particularly as sham. But it does not appear to be false. On the contrary, there is no reason to doubt its truth. The defendant does not appear to have ever had any connection with this memorandum, from which it could be inferred that the contents thereof are known to it. (*Oregonian Ry. Co. v. Oregon R. & N. Co.*, 10 Sawy. 467.)

The eighth one is also a denial of knowledge, whether the plaintiff's directors ever adopted a resolution authorizing the execution of said lease. It is also moved against as sham. But it does not appear to be false, and must be taken to be true for the same reason.

The fourth one is an allegation as to what the memorandum of association under the companies act of Great Britain is required to contain, without any averment that the plaintiff has not complied therewith in its formation, or any other application of the matter, and is therefore immaterial.

The fifth one is a denial of the defendant's power to lease or operate the plaintiff's road. This is a mere conclusion of law, and should have been alleged, if relied on, by a demurrer to the complaint. (*Oregonian Ry. Co. v. Oregon R. & N. Co.*, 10 Sawy. 472.)

The sixth, seventh and twelfth ones, are allegations to the

1886.]

Opinion of the Court—Deady, J.

effect that the plaintiff's road has no near connection with the defendant's; that the capital stock of the latter was not contributed to operate leased roads; and that the lease in question was not ratified by its stockholders. These matters are immaterial and utterly frivolous. (*Oregonian Ry. Co. v. Oregon R. & N. Co.*, 10 Sawy. 488.)

The ninth, tenth and eleventh ones are clauses and phrases found in an allegation that the lease in question was executed by the president and assistant secretary of the defendant in pursuance of an invalid resolution passed by a minority of the directors without authority of law, to the effect, that while the defendant's principal office is at Portland, its president and assistant secretary signed and sealed said lease at New York.

These clauses are omitted from the answers in the last two cases. They are clearly immaterial. It is well settled that while a corporation can have no legal existence beyond the boundaries of the state of its creation, yet it may act any where through its agents the same as a natural person, unless prohibited by law. (*Bank v. Earle*, 13 Pet. 588; *Runyan v. Costars' Lessee*, 14 Pet. 129; *Galveston Ry. Co. v. Cowdrey*, 11 Wall. 476; *McCall v. Byran*, 6 Conn. 436; *Bel lows v. Todd*, 29 Iowa, 217; *O. & M. Ry. Co. v. McPherson*, 35 Mo. 25; *Field on Corporations*, secs. 25, 254.)

The thirteenth and fourteenth ones are statements to the effect, that on May 15, 1884, the defendant offered to return the road to the plaintiff, but that the defendant retained possession of the same, under a stipulation with the plaintiff that such possession should not have the effect to prejudice either party, until November 5, 1884, when in a suit brought in this court by the plaintiff, the defendant was enjoined and required to operate the road until the further order of the court, which it did until the appointment of a receiver in said suit on the motion of the plaintiff; who thereupon took possession of the property, and held it during the period for which the rent is sought to be recovered in this action.

This is not an action to recover money for the use and occupation of the premises. It is brought on the covenant

Opinion of the Court—Deady, J.

[April,

of the defendant contained in the lease, to pay the specific amount therein reserved as rent. Therefore these allegations concerning the possession of the property are immaterial. They do not effect the obligation of the defendant to pay the rent according to its contract; unless it is further alleged that such non-occupation was the direct result of the fraud or misconduct of the lessor. (*Oregonian Railway Co. v. Oregon R. & N. Co.*, 10 Sawy. 476.)

And so far as the possession of the receiver is concerned, it is for the benefit of whom it may concern; and so far as appears, that is defendant.

All the clauses in the answer moved against, except the third and eighth ones, are immaterial. The matter contained in these comes within the purview of the demurrers to the answers.

The demurrers are taken to all those portions of the answers that controvert or deny the corporate existence and due organization of the plaintiff or the powers, franchises or ownership of the plaintiff alleged in the complaints, for the reason "the defendant ought not to be allowed or heard to say, that the plaintiff is not a corporation or has no power to make the contract herein sued on, or to make any denials contrary to defendant's own acknowledgment and deed of August 1, 1881, as appears by the complaint herein and admitted by the answer thereto."

These demurrers are well taken. (*Oregonian Ry. Co. v. Oregon R. & N. Co.*, 10 Sawy. 477.) This question was well considered in that case, and I have nothing to add to the conclusion reached therein. As was then said: "Where the law authorizes the formation and existence of the alleged corporation, with power to make the contract in question, then a party thereto ought not and cannot be heard, in an action thereon by such corporation, to deny its due formation or legal existence, with the power to make said contract."

On November 27, 1885, the plaintiff replied to so much of said answers as are not included in the demurrers thereto and the motion to strike out.

After denying any knowledge of the invalidity of the meeting of the defendant's directors, at which the execution

1886.]

Opinion of the Court—Dady, J.

of the lease was authorized, the replies briefly stated, allege: (1) A ratification of the lease by the defendant with knowledge of all the facts, by entering upon and taking possession of the road thereunder, about August 1, 1881, and continuing in the same, and paying rent therefor until May 15, 1884, wherefore the defendant ought not to be allowed or heard to deny the execution of said lease or the binding obligation thereof; (2) That the defendant ought not to be allowed or heard to deny the execution by it of said lease, because on June 28, 1884, the plaintiff commenced an action against the defendant thereon, in this court, for the installment of rent falling due thereon, on May 15, 1884, wherein, among other things, the due incorporation of the plaintiff and its power and authority to construct and lease said road, as well as the due execution and validity of said lease and the power and the authority of the plaintiff and defendant to execute the same and perform the covenants therein contained, were put in issue and contested by a demurrer to the answer of the defendant therein, and by the judgment of this court thereon, were determined in favor of the plaintiff; whereupon, on March 28, 1885, the defendant not making or offering to make any further answer of defense to the complaint, final judgment was given thereon for the plaintiff and against the defendant for the sum demanded thereon; (3) That the defendant ought not to be allowed or heard to deny the corporate existence of the plaintiff, or to deny the demise by the plaintiff to the defendant, or the due execution by each of them of said lease as alleged in the complaint, because on June 25, 1885, the plaintiff commenced another action thereon, in this court, against the defendant, to recover three semi-annual installments of the yearly sum of two thousand nine hundred and nineteen dollars and ninety cents, which the defendant in and by said lease, agreed to pay the plaintiff, to meet the expense of maintaining its organization, pending said lease, amounting in the aggregate to four thousand three hundred and seventy-nine dollars and eighty-five cents, wherein on July 29, 1885, on a demurrer to the complaint by the defendant, judgment was given against it for the amount claimed by the plaintiff; and (4) In the last two actions,

Opinion of the Court—Dedy, J.

[April,

denies that on July 29, 1885, or other time, in any action then pending between the plaintiff and defendant for the same cause of action set forth herein, any judgment was given in favor of the former or against the latter for the sum of four thousand and twenty-eight dollars and thirty-two cents or any other sum.

On November 28, the defendant moved to strike out the reply of ratification and the two replies of prior adjudication, and also an averment following the denial therein of any knowledge of the alleged invalidity of the meeting of the defendant's directors, at which the lease was authorized, to the effect, that said meeting was duly called and held, and the resolution in question duly passed thereat. The effect of these two contradictory allegations as to this matter of the meeting in question, is to make the denial a sham or the averment redundant, as the party moving against them may elect.

The motions to strike out were allowed, as to the averment, on the ground of redundancy, and denied as to the replies, for the reason that their sufficiency ought to be tested by demurrer. Thereupon, on January 2, 1886, the defendant demurred to the two replies of former adjudication, and the questions arising thereon were then argued by counsel and submitted.

From these replies it appears that certain matters set up in the answers herein as a defense to these actions have been heretofore considered and determined in this court, in an action between these parties, on this lease, in favor of the plaintiff.

On a demurrer to a complaint every material matter well pleaded therein is confessed, and if judgment is given thereon, the same is as conclusive and binding on the parties to the action as though it was given on an issue arising on a denial of the allegations of the complaint. And if a final judgment is given for the plaintiff, on a demurrer to the answer, such judgment is a conclusive determination, between the parties, of the questions involved in the defense made by such answer, and of the truth of the material allegations in the complaint, and may be pleaded as an estoppel

1886.]

Opinion of the Court—Dedy, J.

in any other action between them. (*Gould v. Evansville, etc., Ry. Co.* 91 U. S. 553; *Aurora v. West*, 7 Wall. 99; *Goodrich v. City*, 5 Wall. 573; *Wells Res. Adjudicata*, secs. 446.)

In the first action mentioned in the reply, it appears that the defendant answered the complaint and alleged the invalidity of the lease for the reason among others, that it had no power to execute the same; and on a demurer to this answer final judgment was given for the plaintiff. In the second one, all the material facts relative to the incorporation of the plaintiff and the execution of the lease by the plaintiff and the defendant, were admitted by a demurrer to the complaint on which there was a final judgment in favor of the former.

A judgment in an action on a particular demand, is an estoppel in an action between the same parties, as to any fact or matter actually put in issue and determined or admitted in the prior action. (*Davis v. Brown*, 94 U. S. 428; *Cromwell v. County of Sac.*, *Id.* 353; *Russell v. Place*, *Id.* 608; *Beloit v. Morgan*, 7 Wall. 619; *Sharon v. Hill*, 9 West Coast Rep. 9.)

Beloit v. Morgan, *supra*, is a good illustration of the rule, and a case on all fours with this. A judgment was given in an action on a bond against the maker thereof, in favor of the plaintiff. The bond was one of a series issued at the same time, and in a subsequent action between the same parties, on another of these bonds, it was held that the judgment in the first action was conclusive as to the validity of all of them. The court said in substance that all the objections made to the enforcement of the bonds in the second action might have been made in the first; and that "a party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction."

In this lease there are, so to speak, a successive series of obligations or undertakings by the defendant to pay rent to the plaintiff every half year for a number of years, incurred or assumed at the same time and under the same circumstances. In the action brought to recover an earlier installment of this rent, the defendant might have made any defense thereto, involving the validity of the lease or its lia-

bility thereunder. And the question of the validity of the lease and the liability of the defendant to pay the rent therein reserved having been determined in favor of the plaintiff in that action, the controversy is so far closed, and the defendant is estopped to set up any defense to a subsequent action for the recovery of any other of such installments of rent, that existed and might have been made to the former action. On the argument it was suggested that the judgment in the first of the former actions had been taken to the supreme court on a writ of error, and therefore its operation as a bar or an estoppel is suspended. It is admitted that the writ of error has been taken as suggested; but even then, it is not clear that the court can take notice of the fact on the demurrer to the replication. On the trial of the question made by the reply, the record of the former suit being introduced in support of the allegation therein, the fact that the judgment had been taken to the supreme court on error may be shown by way of confession and avoidance of the reply, if the effect of such a proceeding is to suspend the force and operation of the judgment, as claimed.

But considering, for the time being, that the admission of the plaintiff's counsel, as to the writ of error, is a part of the reply, the estoppel of the former judgment is not affected thereby. A writ of error does not suspend the operation of a judgment, as a bar or an estoppel. It is not an appeal, which is so far a continuation of the original suit, but a proceeding in the nature of a new action to annul and set aside the judgment of the court below, which is not thereby vacated or affected, pending the proceeding. (*Railway v. Twombly*, 100 U. S. 81; *Sharon v. Hill*, 9 W. C. Rep. 9; *ante*, Freeman on Judg., sec. 328.) [A writ of error from the supreme court to this is not a proceeding under the code, but the common law, as modified by the revised statutes. The declaration in the latter clause of section 505 of the code, that an action "is deemed pending from the commencement thereof until its final determination on appeal," has no application to an action in this court—at least after it has terminated in a judgment for either party. The pro-

1886.]

Points decided.

ceeding for the review of such a judgment is had in the supreme court, and is not within the operation of section 914 of the revised statutes, conforming the practice in the circuit and district courts to that of the state courts.

But it is also admitted that no writ of error has been taken to the judgment in the second action mentioned in the reply, and there is therefore no question, that it is an estoppel as to all the material matters admitted by the demurrer to the complaint herein.

The motions to strike out portions of the answers are allowed except as to the clauses numbered three and eight, and as to these they are disallowed. The demurrers to the answers including the matter in said clauses three and eight, are allowed; and the demurrers to the replies are overruled.

This leaves the cases for trial on the questions of fact arising on the replies of ratification and prior adjudication to the answers of the defendant, the former being by section 92 of the code, "deemed controverted by the adverse party, as upon a direct denial of avoidance as the case may require," without any actual rejoinder thereto; and the issues made between the replies in numbers 1120 and 1143 to the defenses of former judgments in actions on the same cause of action.

JOHN SCHEERER v. COLUMBIA STREET BRIDGE COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

APRIL 19, 1886.

1. **NAVIGABLE WATERS IN OREGON—POWER OF THE STATE OVER.**—Under the ruling in *Cardwell v. Bridge Company*, 113 U. S. 205, the provision in the act of congress of February 14, 1859 (11 Stat. 383), admitting Oregon into the Union, which declares that "the navigable waters of said state shall be common highways and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll therefor," does not prevent the state from authorizing the erection of a bridge across the Wallamet river at Portland, however much it may impede and obstruct the navigation thereof; nor has the United States circuit court any jurisdiction of a suit to enjoin the same.

Before DEADY, District Judge.

Mr. P. L. Willis for the plaintiff.

Mr. George L. Durham for the defendant.

DEADY, J. This suit is brought to restrain the defendant from erecting a bridge across the Wallamet river between the foot of Madison street in Portland, and T street in East Portland.

An application for a provisional injunction was heard on the bill and a general demurrer thereto.

The plaintiff is a riparian owner whose land has a frontage of two hundred feet on the west bank of the Wallamet river, and is situated about one thousand feet above the site of the proposed bridge; and his complaint is, that the erection of the bridge will so obstruct and hinder the navigation of the river as to prevent vessels engaged in the commerce of this port from at least, with safety and convenience, reaching his property.

The bill states that the river at the site of the proposed bridge is about one thousand four hundred and seventy-five feet wide, with a ship channel of about four hundred feet in width; and that the bridge will consist of six solid spans of two hundred feet each in length, resting on piers built in the river, and one section two hundred and seventy feet long, resting on a draw pier as a pivot, which, when turned parallel with the stream, will give a passage way of one hundred and twenty feet in width on either side of said pivot pier; that the distance from the lower chord of the span is only eight feet above high water mark, and the construction of the proposed bridge will obstruct and impede the navigation of the river and the use of the harbor of Portland, which extends from the lower end of the city southward a distance of about three miles, and for half a mile above the plaintiff's property.

The defendant claims the right to build the bridge under an act of the legislature of the state, passed February 26, 1885 (Sess. L. 472), as amended by the act of November 24, 1885 (Spec. Sess. L. 14); but the plaintiff alleges that the same is void or inoperative, as being in conflict with the act of congress passed February 14, 1859 (11 Stat. 383), for the

1886.]

Opinion of the Court—Dedy, J.

admission of Oregon into the Union, wherein it is provided that "all the navigable waters of the state shall be common highways and forever free, as well to the inhabitants of said state, as to all the other citizens of the United States, without any tax, duty, impost or toll therefor."

The questions arising on this demurrer were considered by the court in *Hatch v. Wallamet Iron Bridge Co.*, 7 Sawy. 127, and again in *Wallamet Bridge Co. v. Hatch* 9 Sawy. 643, where it was held that by the act of 1859, congress, in the exercise of its power to regulate commerce between the several states, had declared the Wallamet river, as a means of said commerce, "a common highway," and therefore the state of Oregon could not authorize any one to build a bridge across the same, which, the circumstances considered, would needlessly impede or obstruct the navigation thereof; and that the question of what constitutes such impediment or obstruction, arises under said act of congress, and therefore this court has jurisdiction of a suit involving the same. The doctrine of this case was followed, in the opinion of the court, in *Cardwell v. The American River Bridge Co.* 9 Sawy. 662. But on appeal to the supreme court it was held (113 U. S. 205) that the provision in the act admitting California into the Union, concerning the navigable waters therein, which is similar to that in the one admitting Oregon, does not of itself deprive the state of the power possessed by other states to authorize the erection of bridges over navigable waters therein; and that the provision is only intended to prevent the use of navigable streams by private parties, to the exclusion of the public, and the exaction of tolls for their navigation.

The proposed bridge at the foot of Madison street is five blocks, or about one thousand three hundred feet, farther south than the one in *Hatch's case*, and is otherwise much less objectionable—the opening at the draw being one hundred and twenty feet in the clear instead of only one hundred. But it matters not what is the character of the bridge, or how much of an obstruction it will be to navigation, if the state authorizes it, and the United States has passed no law on the subject of impediments and obstructions to the

navigation of the river, this court has no jurisdiction to prevent the erection of the same.

The *Hatch* case is now pending in the supreme court on appeal, and may be decided at this term, but it is not probable that any modification in the ruling in the *Cardwell* case will be made. And if congress has no power to pass an act to prevent the obstruction of the navigable waters of a state by the erection of solid bridges or otherwise, unless the same applies to the navigable waters of all the states, as the argument in that case seems to imply, then it is not apparent how the provisions in the acts relating to the admission of Oregon and California are valid, even as against a claim under the state, to the exclusive use of any of the navigable waters therein or to the exaction of tolls for the navigation thereof.

Certainly, congress has as much right to legislate against physical obstructions being made to the navigation of the waters in a state, in detail and specially, as to prevent their exclusive use by any one, or the exaction of tolls for the same in that way.

But admitting the power in congress to legislate specially on this subject, the court in the *Cardwell* case went so far as to hold that, notwithstanding the act of congress, in effect declares the American river a common highway, forever free "to the citizens of the United States," the state of California may authorize the erection of a low, solid bridge across it, which prevents it from being used as a highway by any one. The act, says the court, has but one object, namely, "to insure a highway open to all without preference to any." But I respectfully submit that on this interpretation of the act a better definition of its purpose would be—"it intends to secure an open highway to all or to none, as the state may judge expedient."

But whatever my judgment in the premises may be, this construction of the legislation by congress is binding on this court, and therefore I must refuse this injunction and sustain the demurrer to the bill and dismiss it; and it is so ordered.

1886.]

Opinion of the Court—Deady, J.

CHARLES KIE, PLAINTIFF IN ERROR, v. THE UNITED STATES.

CIRCUIT COURT, DISTRICT OF OREGON.

MAY 1, 1886.

1. ALASKA—NOT “INDIAN COUNTRY.”—Alaska is not “Indian country,” in the sense in which that phrase is used in the intercourse act of 1834 and the revised statutes.
2. IDEM—JURISDICTION OF DISTRICT COURT THEREIN.—The district court of Alaska has jurisdiction under sections 5339 and 5341 of the revised statutes, to try and punish any inhabitant of the district for the crime of murder or manslaughter committed by the killing of any human being therein; but the law of Oregon defining the crime of murder or manslaughter, and prescribing the punishment therefor, is not in force in Alaska.
3. ERRONEOUS SENTENCE.—The plaintiff in error being convicted of manslaughter, was sentenced to punishment therefor under the law of Oregon instead of the act of 1875 (18 Stats. 473), whereby his imprisonment was authorized for twenty days in excess of the punishment allowed by said act: *Held*, that the judgment was erroneous, and the same was reversed, with direction to have the plaintiff in error sentenced according to law.
4. JURY PRESUMED TO HAVE BEEN LEGALLY SELECTED AND DRAWN.—It appeared from the record that when the case was called for trial a jury came who were duly impaneled and sworn: *Held*, that in the absence of anything to the contrary, the presumption is, that the jury were selected and drawn according to law.
5. SELECTION AND QUALIFICATION OF JURORS IN ALASKA.—Jurors to serve in the district court of Alaska must be selected in the manner provided in section 2 of the act of June 30, 1879 (21 Stats. 43), and have the qualifications prescribed by the law of Oregon.
6. PRESENCE OF THE DEFENDANT.—In the trial of a criminal action involving corporal punishment, the record should show that the defendant was present; but it is sufficient if his presence may be fairly inferred from the whole record, without being explicitly stated at every stage of the procedure.

Before DEADY, District Judge.

Mr. Alfred S. Frank, for the plaintiff in error.*Mr. Lewis L. McArthur*, for the defendant.

DEADY, J. This is a writ of error to the district court of Alaska, sitting at Sitka.

The writ was allowed by the circuit judge, pursuant to section 7 of the act of May 7, 1884, concerning “a civil government for Alaska” (23 Stat. 24), which provides:

Opinion of the Court—Deady, J.

[May,

“ Writs of error in criminal cases shall issue to the said district court from the United States circuit court for the district of Oregon, in the cases provided in chapter 176 of the laws of 1879; and the jurisdiction thereby conferred on the circuit court is hereby given to the circuit court of Oregon.”

The “ laws of 1879 ” here referred to, is the act of March 3 of that year (20 Stats. 354), which gives the circuit court for each judicial district jurisdiction of writs of error in criminal cases tried before the district court, where the sentence is imprisonment or fine not exceeding three hundred dollars.

It appears from the record that on May 28, 1885, the plaintiff in error, Charles Kie, was indicted by a grand jury of the district court of Alaska, sitting at Sitka, for the crime of murder, alleged to have been committed about September 1, 1884, by stabbing a woman named Nancy, from which stabbing she then and there died.

Kie demurred to the indictment, but the demurrer was overruled by the court; and afterwards, on a trial on the plea of “ not guilty,” he was by the jury convicted of the crime of manslaughter, and sentenced by the court to imprisonment for a term of ten years and fined one hundred dollars.

There is no formal bill of exceptions in the record, but it contains a statement of certain evidence given to the jury on the trial, which, by the argument of counsel, is so far to have the effect of a bill of exceptions.

From this it appears that the killing took place at the town of Juneau, situate on or near Takoo inlet and distant about eighty miles north by east in an air line from Sitka, and at the date thereof the plaintiff in error was living in and belonged to a village of Alaskan aborigines near by; that the deceased Nancy was also an aboriginal Alaskan living with Kie as his wife, and that said Nancy was guilty of adultery, for which cause Kie killed her, as alleged in the indictment, he being permitted and authorized to do so by the laws and customs of the people of said village time out of mind, as a punishment for her misconduct.

That on the close of the testimony a motion was made for

1886.]

Opinion of the Court—Deady, J.

the discharge of the defendant on the ground that sections 2145 and 2146 of the revised statutes, the court had no jurisdiction of the defendant, which motion was denied, and that after the verdict was received a motion was made to set aside the same and discharge the defendant, on the same ground, which was also denied, to which rulings of the court the defendant then and there excepted.

The following are the errors assigned:

“I. The record does not show that the plaintiff in error was present at the trial or when sentence was pronounced on him.”

“II. No mode of selecting a jury is provided by the organic act.”

“III. The court had no jurisdiction to try the cause and the judgment rendered is void.”

The last assignment will be considered first.

It is based on the assumption that Alaska is “Indian country” within the meaning of that phrase, as used in the revised statutes, and section 2146 thereof, which in effect prevents the courts of the United States from taking cognizance of any crime committed by one Indian against the person or property of another, in the Indian country.

In *U. S. v. Savaloff*, 2 Sawy. 311, I held that Alaska was not “Indian country” in the conventional sense of the term; that because a country is owned or inhabited, in whole or in part by Indians or aborigines, it is not therefore “Indian country” within the meaning of that phrase, as used in the intercourse act of 1834 or the revised statutes. This ruling was followed and affirmed in the cases of *In re Carr*, 3 Sawy., 317; *Waters v. Campbell*, 4 Sawy. 121; and *U. S. v. Stephens*, 8 Sawy. 117; and again followed and vindicated in the court below, in an able opinion by District Judge McAllister. (7 W. C. Rep. 6.)

The Savaloff case was decided in December, 1872, and on March 3, 1873, congress apparently gave its sanction to the theory of that case (17 Stat. 530), by amending section 1 of the Alaska act of 1868 (15 Stat. 240), so as to extend over the county, sections 20 and 21 of the intercourse act of 1834, prohibiting the introduction and disposition of spirituous

Opinion of the Court—Deady, J.

[May,

liquors therein. As it rests with congress to say whether a district of country shall be considered "Indian country," so far as the intercourse between the aborigines thereof and other persons is concerned, this legislation, in my judgment, by at least a reasonable if not a necessary implication, is equivalent to a declaration that Alaska is not to be considered "Indian country," only so far as concerns the introduction and disposition of spirituous liquors therein.

Nor is this conclusion contrary to the ruling in *Bates v. Clark*, 95 U. S. 204, or *ex parte Crow Dog*, 109 U. S. 556, in the former of which Mr. Justice Miller said "that all the country described by the act of 1834, as Indian country remains 'Indian country,' so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty, or act of congress;" and in the latter of which Mr. Justice Matthews gives the above paragraph from *Bates v. Clark*, and adds: "In our opinion that definition now applies to all the country, to which the Indian title has not been extinguished, within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes."

The conclusion is not in conflict with the ruling in *Bates v. Clark*, because, as we have seen, Alaska was not described or included in the act of 1834, the same being at the time foreign territory, and for the further reason, that if it had been, congress has since made special and different provision concerning the intercourse therein between the aborigines and others.

Nor do I think it is in conflict with the ruling in *ex parte Crow Dog*, rightly understood. True, it is said in the opinion in the latter case, that the phrase may and does include territory acquired since the date of the act of 1834, and therefore not described in it. But the case then before the court arose in Dakota, a territory acquired from France in 1803, while the anomalous condition of Alaska was not pro-

1886.]

Opinion of the Court—Deady, J.

bably considered by the court, or the language in question used with reference to it; but rather to the similar and contiguous territory acquired from Mexico in 1848, as New Mexico, Arizona, Nevada, Utah and Western Colorado, which, thereupon, in the language of section 1 of the act of 1834 (4 Stat. 720), defining or describing the Indian country, became and were included in "that part of the United States west of the Mississippi and not within the states of Missouri and Louisiana."

Nor is it at all probable that the aborigines of Alaska can or will be considered as dependent or domestic nations, or people having any title to the soil of the country to be extinguished by the United States, as were the Indian tribes north and west of the Ohio river.

The country was purchased from Russia in 1867. By article 2 of the treaty of purchase (Pub. Treat. 672), it is declared that "the cession of territory and dominion" thereby made, shall include "the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks and other edifices which are not private individual property."

Article 3 provides that such of "the inhabitants of the ceded territory" as "prefer to remain" therein, "with the exception of the uncivilized native tribes, shall be admitted to all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country." And article 6 declares such cession "to be free and unincumbered by any reservations, privileges, franchises, grants or possessions * * * by any parties, except merely private individual property-holders; and the cession hereby made conveys all the rights, franchises and privileges now belonging to Russia in said territory or dominion and appurtenances thereto."

At the date of this cession Russia owned this country as completely as it now does the opposite Asiatic shore; and the right of the inhabitants in and to the use of the soil was

Opinion of the Court—Dedy, J.

[May,

such, and only such, as it saw proper to acknowledge or concede to them. The United States took the country on the same footing, agreeing to respect the private property of individuals, and to make such regulations concerning the uncivilized natives, including, of course, their occupation of the soil, as it might deem best.

Accordingly, congress, by the passage of the Alaska act of 1884, has provided a government for the country without any reservation or qualification as to the persons or classes of the inhabitants over and upon whom it shall have jurisdiction and authority. By this act (sec. 8) the laws of the United States relating to mining claims are extended over Alaska, and it is made a land district, with a register and receiver to take proof of the location and make sale of such claims. A commission is also provided for (sec. 12) "to examine into and report upon the condition of the Indians residing in said territory, what lands, if any, should be reserved for their use, what provision shall be made for their education, what rights by occupation of settlers should be recognized, and all other facts that may be necessary to enable congress to determine what limitations or conditions should be imposed, when the land laws of the United States shall be extended to said district."

And the unorganized Alaska act of July 27, 1868 (Chap. 3, Tit. 23, R. S. 15, Stat. 240), is also continued in force except as modified by the act of 1884 (sec. 14), and "the importation, manufacture and sale of intoxicating liquors in said district, except for medicinal, mechanical and scientific purposes," is thereby prohibited under the penalties prescribed in section 4 of the act of 1868, (sec. 1955 R. S.) "for the importation of distilled spirits."

How far this provision repeals or modifies said section 4 and the act of 1870, *supra* amending section 1 of the act of 1868, so as to extend over Alaska, sections 20 and 21 of the intercourse act of 1834, it is not now material to consider. For admitting that the latter act displaces or modifies the former one, it is equally manifest from the passage of the same, that congress does not regard Alaska as being within the purview of the law governing the "Indian

1886.]

Opinion of the Court—Deady, J.

country," and therefore it is necessary to make special provision concerning the introduction and disposition of spirituous liquors therein, or that from the fact of making such special provision, it is evident that congress intended to exclude the act of 1834, as a whole, therefrom.

And as to the state of law on this subject, before this last enactment, see *U. S. v. Stephens*, 8 Sawy. 116.

The people living in the village where this homicide was committed are a tribe or clan of the Thlinkets, a race of marine nomads that inhabit the coast from Mount St. Elias to the southern boundary of Alaska. They dwell in permanent villages during the winter, and wander about during the summer, in search of food, which is derived principally from the water. (Petroff's Alaska, 165 *et seq.*) In the disposition of the soil congress will doubtless make such provision for them and the possession of their villages, as it may deem just and expedient. But for the discovery of gold in the vicinity, no civilized man would ever be tempted to seriously interfere with or contest the right to such possession.

And in such event, it may be found best to provide that for minor offenses, peculiar to their social life and condition, the members of these tribes shall only be tried and punished by their own laws or customs, where they have any. Yet, if it is intended impart to this people the elements of our civilization, as indicated by section 12 of the act of 1884, they must be first made subject to the law which conserves and maintains it, and not be allowed to practice with impunity such acts of barbarity as are involved in the charge against this plaintiff in error.

But for the all-permeating and ever-present and persuasive power of the law, the progress of civilization among the most advanced people would be seriously and constantly retarded, if not checked, by the downward and backward tendency of the mass, who cannot, without this potent agency, be educated and maintained in the necessary habit of self-restraint and justice to others.

However this may be, in my judgment, as the law applicable to the subject now is, Alaska is not "Indian country,"

Opinion of the Court—Deady, J.

[May,

in the conventional sense in which that phrase is used in the act of 1834 and the revised statutes.

Yet, I regard this judgment as erroneous and void, not for want of jurisdiction in the court to hear and determine the case, but because the sentence is in excess of the power of the court to impose.

Section 3 of the act of 1884 provides for a district court for the district of Alaska, "with the civil and criminal jurisdiction" of a district court of the United States; and section 7 declares that "the general laws of the state of Oregon," then in force, shall "be the law in said district so far as the same may be applicable and not in conflict with the provisions" of that act or "the laws of the United States."

So far as the laws of the United States prescribe the jurisdiction of the district and circuit courts, or the method of their procedure, or define a crime and prescribe its punishment, the Alaska court is governed by them, and when these are silent or make no provision on the subject, resort must be had to the laws of Oregon, so far as they are applicable.

The defendant was indicted for the crime of murder under section 506 of the criminal code of Oregon, which defines the crime of murder in the first degree, and being found guilty of manslaughter, was sentenced under section 518 thereof to imprisonment for ten years, and to pay a fine of one hundred dollars; and in pursuance of section 209 of said code, to be also imprisoned until said fine is paid, not exceeding one day for every two dollars thereof.

But section 5339 of the revised statutes provides for the punishment of "every person who commits murder" in "any district of country under the exclusive jurisdiction of the United States." Section 5341 of the same prescribes what killing in such a district constitutes manslaughter; and by section 1 of the act of March 3, 1875 (18 Stats. 473), it is provided that "a person convicted of manslaughter in any court of the United States" shall be punished by imprisonment not exceeding ten years and a fine not exceeding one thousand dollars.

Now, Alaska is and has been since 1867 "a district of

1886.]

Opinion of the Court—Deady, J.

country under the exclusive jurisdiction of the United States." Therefore these statutory provisions concerning the commission and punishment of murder and manslaughter are in force therein, and necessarily exclude the operation or application there of any law of Oregon on these subjects.

In 1879 Kot-ko-wat, and in 1882 Ki-ta-tah, both aborigines of Alaska, were tried and convicted in this court, under the statute, for murder committed in Alaska, and were punished with death.

No law of Oregon is to have effect in Alaska if it is in conflict with a law of the United States. There is such a conflict within the meaning of the statute, not only when these laws contain different provisions on the same subject, but when they contain similar or identical ones. In the latter case it is the law of congress that applies, and not that of the state. In this case the proceeding, though professedly had under the Oregon statute, was, in contemplation of law, taken under the statute of the United States, and conforms sufficiently thereto, except in the matter of the sentence.

The United States statute (sec. 5296, R. S.) provides that in case any person is sentenced to pay a fine, and has been imprisoned thirty days solely for the non payment thereof, he shall be discharged on showing his inability to pay the same. But by the sentence in this case, the plaintiff in error, after serving his sentence of imprisonment, is to be confined fifty days longer for the non payment of the fine of one hundred dollars, or one day for each two dollars thereof, without reference to his ability to discharge the same. And so the sentence, in effect, authorizes his imprisonment for twenty days longer than the law allows; and for this error the judgment is reversed and the cause remanded with directions to the district court to cause the plaintiff in error to be brought before it, to receive such sentence as the law warrants and the court may deem proper.

This makes it unnecessary to consider the other assignments of error on this writ. But as they go to the validity of the proceeding anterior to the judgment, the case may be brought here again for review if they are not now disposed of.

As to the second assignment of error, very little need be said.

The act of June 30, 1879 (21 Stat. 43), makes provision for the selection and drawing of jurors in the national courts, and the district court of Alaska should conform to it. There is nothing in the record in this case to show that it did not, and the presumption is that it did. No objection appears to have been taken to the selection or drawing of the jury. The record simply states, in the usual way, when the case was called for trial a jury came and was duly impaneled and sworn.

But the question of who is qualified to serve as a juror in the district court of Alaska must be answered by the law of Oregon. Section 800 of the revised statutes, which declares that jurors in the national courts shall have the qualifications prescribed by the law of the state in which they sit, cannot apply, for there is no law of Alaska on the subject, unless it be the law of Oregon; and in either case it follows, that the qualification of jurors in Alaska and the liability of persons to serve as such must be determined by a reference to this law.

Sections 918, 919 and 920 of the code of civil procedure contain the law of this state on the subject. They provide that a person is not competent to be a juror unless he is: (1) A citizen of the United States; (2) a white male inhabitant of the county for the year before he is called; (3) over twenty-one years of age; and (4) in the possession of his natural faculties.

Who are citizens of the United States in Alaska under article 3 of the treaty of 1867 may be a difficult question to determine. The treaty furnishes the law, but the difficulty, if any, will arise in the application of it. Under the treaty, the inhabitants of Alaska at that date who did not return to Russia within three years thereafter became citizens of the United States—excepting members of the uncivilized tribes.

The word "white" in the second clause is no longer regarded as the law of the state; and is expressly displaced, so far as the courts of the United States are concerned, by the proviso to section 2 of the act of 1879, *supra*. The

1886.]

Opinion of the Court—Deady, J.

words, "county in which he is returned," in the same clause, must be held inapplicable to Alaska, where there are no counties, and their place supplied by the word "district."

The following sections of the code, providing for the selection of jurors and the formation of a jury list by the county court from the assessment roll, are of course inapplicable, as there are neither county courts nor assessment rolls in Alaska. And besides, the act of 1879 prescribes another mode for selecting jurors.

The first assignment of error must also be allowed. It appears from the record that the plaintiff in error, who was in close custody, was brought into court on May 22, 1885, and arraigned, when his trial was set for June 1. On that day, and all subsequent days of the trial, down to and including the sentence—June 8—the record only shows that the parties came by their attorneys.

In case of a felony or where corporal punishment is involved, the defendant must be present during the trial and at the sentence; and the record should show this. But it is sufficient if his presence may be inferred from the same, and it need not be explicitly so stated at each stage of the procedure. (*Stephens v. The People*, 19 N. Y. 522; *Whar. Crim. P. & P.*, secs. 540, 875; *State v. Cartwright*, 10 Or. 193.)

But it would be a strained and unreasonable inference to say that Kie was present during this trial and at the sentence, simply because he appears to have been present at the arraignment some days before; and particularly when the record states explicitly that the parties appeared by their attorneys each day during the trial and at the sentence, from which it may rather be inferred that the plaintiff in error did not appear otherwise.

But from the admission of counsel on the argument, it is morally certain that Kie was present during the trial, and that the failure of the record to show the fact is a mere misprision of the clerk, and therefore the district court will not be directed to set aside the verdict and grant a new trial, but only to allow the plaintiff in error to move therefor, on that ground, and if on the hearing of the same it does not

Master's Report.

[May,

satisfactorily appear from the evidence submitted therewith that he was present, to grant the same; but otherwise to deny the motion and give judgment against him according to the act of 1875.

IN RE NORTH BLOOMFIELD GRAVEL MINING COMPANY.

WOODRUFF v. NORTH BLOOMFIELD GRAVEL MINING COMPANY ET AL8.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MAY 9, 1886.

1. **CONTEMPT—VIOLATION OF INJUNCTION—MINING DEBRIS.**—Running a tunnel twenty-five hundred feet into respondent's mine, and washing the earth removed therefrom, and washing the earth from caves of the banks, occurring from time to time, by a hydraulic monitor, and other washings of earth and debris by water flowing over the high banks of the mine into a tributary of the Yuba river, constitute a violation of the injunction perpetually restraining defendants "from discharging or dumping into the Yuba river or its tributaries any of the tailings, boulders, cobble-stones, gravel, sand, clay, debris, or other refuse matter," from any of their mines; and a contempt. A fine of fifteen hundred dollars imposed as a punishment for the contempt.

Before SAWYER, Circuit Judge.

Mr. A. L. Rhodes and Mr. A. L. Hart, for complainant.

Messrs. Stewart & Herrin, for respondent.

MASTER'S REPORT.

The evidence clearly shows that since the date of the filing of the decree herein, mining tailings have been discharged into Humbug creek by the respondent, the North Bloomfield Gravel Mining Company, from its mine described in the bill. With reference to the character and extent of the mining operations which have been carried on in said mine since the date referred to, it appears from the testimony that in June, 1884, the said respondent commenced the construction of a tunnel along the bed-rock in its mine, for the purpose of drift mining; that drift mining has been there carried on continuously from that time to the present;

1886.]

Master's Report.

and that, up to the present time, twenty-five hundred or three thousand feet of tunnel and drifts, seven feet high, and averaging four and a-half feet wide, have been run. The drift tunnel was started in the mine on the channel, at the base of a point or pinnacle projecting into the excavation, from its northerly bank, about twenty or thirty feet; the height of said point or pinnacle at that time being about one hundred and fifty feet, and its present height being fifty to one hundred feet. In the same month (June, 1884), a twenty-two-inch pipe, terminating with a hydraulic monitor, was placed, and has ever since remained, in a position commanding the mouth of the drift tunnel, distant therefrom about one hundred to one hundred and fifty feet eastwards. To the west of the tunnel mouth, at about an equal distance, is the terminal point of a fifteen-inch pipe, bearing the lower joint or "knuckle" of a monitor. The chief purpose of both of these pipes was to provide streams of water to be used for the protection of the drifting operations. Water driven through the monitor washed away material which caved or was washed down from the banks, and which covered or threatened the mouth of the tunnel. The other pipe mentioned terminated upon the west side of the tunnel mouth, where the banks of the excavation were less liable to injurious caving; and the intention was that, should the caved bank cover the end of this pipe and the bed-rock in its neighborhood, a stream of water passing through this pipe and out at the knuckle would wash away the fallen material. In case of a serious cave of the bank upon that side, a monitor nozzle could readily be adjusted upon the knuckle, and the caved gravel piped away. Water flowing through a branch of the eastern pipe mentioned washed into the outlet tunnel and into the creek the material resulting from the drifting operations.

As previously stated, the location of the monitor has not been changed since it was placed in position, about the time the work of drifting commenced; and the material which has been removed from the vicinity of the drift tunnel in the mine is not of great quantity when compared with that which would have been run off had the monitor been

Master's Report.

[May,

moved from place to place and kept in constant operation, as in former times. Still a considerable quantity of mining tailings has undoubtedly been discharged into the creek from respondent's mine since the date of the decree. During the entire period which has elapsed since that date, at least one thousand miner's inches of water has daily, with the exception of short intermissions for repairs to flumes, been run into and through the mine, either through pipes or over the banks of the excavation.

The drift tunnel was started near the center of a bend in the northern bank of the excavation; and, when preparations for drifting were commenced, a moraine, composed of material which had fallen from the banks, lay on the bed-rock in the immediate vicinity of the present location of the drift tunnel mouth. The form of the moraine was triangular, its base being about two hundred and fifty or three hundred feet across, and its two sides running up to a point at or near the center of the bend referred to. The slope of the moraine from base to apex was gradual, and its depth varied from nothing at the base to twenty-five to thirty feet at the apex. A channel through this mass, from five to eight feet in width, was made by water flowing into the mine through the Malakof ravine, and the remainder of the moraine has since been washed away. In the bank on each side of the projection in which the mouth of the drift tunnel is located, a chasm or gorge has been washed back two or three hundred feet, its width being two or three feet at the bottom and about one hundred feet at the surface, the banks in that locality being of a height of at least two hundred feet. Some portion of the bank in the vicinity of the drift tunnel mouth has also been washed away. Some portion, however, of the gravel which has caved from the top of the pinnacle which overtops the drift tunnel, and some of the material which has fallen from the banks upon either side, still remains within the excavation, as it fell. The testimony also shows that water has been run over the embankment, and so, through the outlet tunnel, into Humbug creek, at other places than at those mentioned above.

1886.]

Opinion of the Court—Sawyer, C. J.

I therefore find, and do report, that since June, 1884, the North Bloomfield Gravel Mining Company, respondent, has been continuously engaged in practical drift mining in its mine described in the bill herein; that, in prosecuting, facilitating, and protecting such drift mining operations, said respondent has removed from its said mine and discharged into Humbug creek, a tributary of the Yuba river named in the decree herein, a considerable quantity of mining tailings; that mining tailings in much less quantity, have also been by said respondent discharged from its said mine into said creek, by means of water run from ditches over the banks of said mine; and that thereby said respondent has violated the decretal order of this court, and is in contempt.

Respectfully submitted,

S. C. HOUGHTON, Master.

SAWYER, Circuit Judge. The master reports that since the entry of the decree, "mining tailings have been discharged into Humbug creek by the respondent, * * * from its mines described in the bill." After stating that respondent had run some twenty-five hundred to three thousand feet of tunnel for drift mining, and carried on drift mining continuously from June, 1884, washing the debris arising from such mining and from caves of the bank occurring from time to time, washed away by monitors properly located for the purpose, into the creek wherein the debris had theretofore been discharged, and giving particulars of the operations of respondent, he concludes:

"I therefore find and report that since June, 1884, the North Bloomfield Gravel Mining Company, respondent, has been continuously engaged in practical drift mining in its mine described herein; that, in prosecuting, facilitating, and protecting such drift mining operations, said respondent has removed from said mine and discharged into Humbug creek, a tributary of the Yuba river named in the decree herein, a considerable quantity of mining tailings; that mining tailings, in much less quantity, have also been discharged from its said mine into said creek, by means of water run from ditches over the banks of said mine; and

that thereby said respondent has violated the decretal order of this court, and is in contempt.”

No exceptions to the master's report were filed by respondent, and there was no good ground for exception; but the complainant filed several exceptions upon the ground that upon various points the findings were not so strongly put against said respondent as the testimony requires, and on the ground that he did not find that the violation of the injunction was willful. The testimony upon which the findings are based were reported in full, in pursuance of the order. After a careful examination of the evidence, I am satisfied that the master has made an intelligent, fair, and impartial report; but it is certainly fully as favorable to the respondent as it was entitled to expect, and is sufficient, without modification, in the light of the testimony, to enable the court to make a proper disposition of the question of contempt.

The respondent insists that the mining done being “drift mining,” as his counsel term it, and the hydraulic washing performed by means of the monitor being such as was incident to the drift mining, and was necessary to the protection and successful carrying on of the drift mining, there was no violation of the injunction. It is insisted that this drift mining, and its incidents, are not within the terms of the decree; or, if otherwise, that the decree is broader than is justified by the allegations of the bill, and to that extent should not be enforced. I cannot assent to this view. It is true that the bill describes the operations carried on by respondent, by means of which the debris is thrown into the stream, as hydraulic mining. But this is only a means by which the debris which works the mischief is discharged into and deposited in the stream, and sent on its destructive course. The thing sought to be restrained is not hydraulic mining—merely the means by which the debris is discharged into the stream. It is not sought to restrain hydraulic mining in itself, or as an occupation, but only so far as it is a means of injury.

The complaint is that the debris is discharged into and deposited in the streams, to complainant's injury; that,

1886.]

Opinion of the Court—Sawyer, C. J.

“with full knowledge of the irreparable damage to your orator caused, and to be caused, by the aforesaid use of the channels of the foregoing described streams, as a place of deposit and wastage of the tailings of these said mines, * * * they make the announcement of their intention to continue the use of the channels of the Yuba river, and its tributaries, aforesaid, as a place of deposit for their tailings from their aforesaid mining claims,” etc.; and that they “claim a common right to deposit the tailings and debris from their several mines in the Yuba river and its tributaries,” etc. The prayer of the bill is for an injunction, not against hydraulic mining merely, but “enjoining them, and each of them, from discharging or dumping into the Yuba river, or any of its forks or tributary streams, or into Deer creek, any of the tailings, boulders, cobble-stones, gravel, sand, clay, debris, or refuse matter from any of said tracts of mineral lands or mines; and also from causing or suffering to flow into said creek, or tributary streams aforesaid, any tailings, boulders, cobble-stones, gravel, sand, clay, or refuse matter therefrom,” etc., and the decree conforms to the prayer, and provides that the said defendants, “and their and each and all of their servants, agents and employees, are perpetually enjoined and restrained,” not from hydraulic mining, but “from discharging or dumping into the Yuba river, or into any of its forks or branches, or into any stream or tributary to said river, or any of its forks or branches, and especially into Deer creek, Sucker Flat ravine, Humbug creek, Scotchman’s creek, any of the tailings, boulders, cobble-stones, gravel, sand, clay, debris, or refuse matter from any of the tracts of mineral land or mines described in the complaint; and also from causing or suffering to flow into said rivers, creeks, or tributary streams aforesaid, therefrom, any of the tailings, boulders, cobble-stones, gravel, sand, clay, or refuse matter resulting or arising from mining thereon.” If respondent can work their mines by the hydraulic process or otherwise, without discharging their refuse matter into the streams, they are at full liberty to do so.

This language was carefully considered when the terms of

the decree were settled, and I do not think it broader or more comprehensive than either the prayer or the allegations in the body of the bill justified. It can make no difference whether the refuse matter is thrown into the streams by what is strictly called hydraulic mining or drift mining. This can only be a question of degree in the injury resulting. The acts found by the master are clearly within the terms of the decree and the acts complained of. Indeed, if the decree could be limited, as to debris thrown into these streams, to hydraulic mining alone, I think the acts reported by the master, and, especially, as shown by the testimony taken, constitute "hydraulic mining," within the proper meaning of the term as used in the bill. There was, certainly, considerable "hydraulic mining" within the narrowest meaning of the term.

There is, in my judgment, no matter of estoppel in the observations of counsel made during the progress of the trial. Until reversed, the rights of the parties are settled by the decree and the pleadings upon which it is founded. There is no evidence of the complainant's having assented to, or having induced, any violation of the injunction since the entry of the decree. The respondent, therefore, must be adjudged to be in contempt.

It only remains to determine the punishment that should be inflicted for the contempt adjudged. As this is the first occasion in this court of the kind, and the defendant disclaims any intent to disregard the decree of the court, and its officers profess to believe that mining in the mode pursued by them, which they call "drift mining," would not be a violation of the injunction, and considering the observations of complainant's counsel at the trial, I shall not be severe, in view of the immense interests affected, and the amount of the proceeds of the mine resulting from the violation of the injunction. Considering the amount of work performed, which although far below what had formerly been accomplished, the amount of debris discharged into the streams was by no means inconsiderable. The decree in this case is either right or wrong. If right, there can, properly, be no temporizing or compromise by allowing

1886.]

Points decided.

some wrong to be done. The wrongful acts of filling the streams with the debris, to the injury of parties below, by whatever means accomplished, must be wholly stopped, in all cases, or the rights of the injured parties cannot be efficiently protected. Having no doubt, myself, of the propriety of the decree, in all its parts, it is my imperative duty to hereafter enforce it, if necessary, by all the sanctions afforded by the law. If wrong, it can readily be corrected on appeal. Let judgment for a fine of one thousand five hundred dollars be entered, with costs. As a compensation, in part, for the large expenses that must have been incurred in procuring evidence and prosecuting this proceeding for contempt, the money, when collected, will be paid over to complainant or his solicitors.

Let judgment be entered accordingly.

BRAGG v. CITY OF STOCKTON.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MAY 10, 1886.

1. PATENTS FOR INVENTIONS—INFRINGEMENTS—ELECTION OF REMEDIES FOR INFRINGEMENT OF PATENTS.—The patentee may sue at law for his royalty or patent fee, one who infringes by using his invention; or, at his election, sue in equity for the profits arising from such infringement, and for an injunction against further use.
2. SAME—NOVELTY—GONG ATTACHMENTS FOR FIRE-ENGINE HOUSES.—Claims 3 and 4 in patent No. 6831, issued to Robert Bragg, for gong attachments for fire-engines, sustained.
3. SAME—REGISTERING STROKE OF ALARM.—The third claim of patent No. 173,261, issued to Robert Bragg, for an invention registering the number of strokes for giving a fire alarm, sustained.
4. SAME—PRIOR USE—NOTICE.—Testimony taken before the examiner, under objection, tending to show prior use, will be rejected by the court, when no notice of such prior use has been given, and it has not been set up in the answer.

Before SAWYER, Circuit Judge.

IN EQUITY.

Mr. Joseph R. Leggett and *Mr. Montague R. Levenson*, for complainant.

Mr. F. Smith, for defendant.

Opinion of the Court—Sawyer, C. J.

[May,

SAWYER, Circuit Judge, orally. In this case I have had some difficulty in determining, under the decisions in the circuit courts on the subject, whether or not the bill in equity should be maintained. (See *Smith v. Sands*, 24 Fed. Rep. 470, and cases cited.) It does not appear that the defendant has ever made or sold any machines including the invention in question, or that it intends to do anything of the kind. It has only used some three or four machines which other parties made for it, there being no evidence of an intention to use any other machines than those it now has.

As compensation for the machines used is prayed for, the question arises whether complainant will be entitled to an injunction. As said in the case of *Spaulding v. Page*, 1 Sawy. 703, I think the complainant may waive a license fee, and elect as his remedy an injunction against the further or continued use of the machines. Of course, if he can do that, he can maintain his suit in equity. But in order to do that, he cannot recover a *royalty* upon those machines; for by paying the royalty the defendant would be entitled to use them until worn out, and should not be enjoined from so doing; and for the royalty his remedy at law is simple. Complainant would have to be limited to the profits and damages arising from the use of those particular machines, up to the time of the restraining of their further use, if a perpetual injunction against further use is sought. In that aspect, I think it is a proper case for equity jurisdiction; on the ground that the complainant is entitled to an injunction, without damages, if he prefer, or to an account of profit to the present time, and to an injunction against further use.

In *Birdsell v. Shaliol*, 112 U. S. 487, says Mr. Justice Gray:

“But an infringer does not, by paying damages for making and using a machine in infringement of a patent, acquire any right himself to the further use of the machine. On the contrary, he may, in addition to the payment of damages for past infringement, be restrained by injunctions from further use; and, when the whole machine is an infringement of the patent, be ordered to deliver it up to be destroyed.”

1886.]

Opinion of the Court—Sawyer, C. J.

It would seem that the injured party should be the one to elect that one of two remedies against a wrong-doer, which he deems most advantageous. An injunction against further use may be preferable to a license fee. The mere license fee is not a complete recompense, when the patentee is driven into the expense of a lawsuit by the wrong-doer.

From a careful examination of the evidence, I think the third and fourth claims of re-issued patent No. 6831; also the third claim of letters patent No. 173,261, have been infringed by defendant by the use of the inventions covered by these claims. Unless enjoined, it is evident that defendant will continue to use those machines which it already has. I think, also, that these claims are valid.

An attempt was made to establish an anticipation of the invention covered by the third claim of letters patent No. 173,261. As in most cases where a valuable invention has been patented, a witness appeared who testified that, prior to the date of the patent, he saw something like it. I am not satisfied that the witness who testified in this case on that point ever made a device like that described in the third claim of patent. There is no other testimony to support his statement. If he made the machine for Stephen D. Field, as he testifies, and it was used for several years so publicly, in San Francisco, as he states, there would, certainly, have been other witnesses who would have seen it. In the case of *Bragg v. City of San Jose*, in this court, in relation to the device which he says he manufactured for Field, this same witness gave a very different description from that which he gives in this case; and that testimony in the *San Jose case* has been introduced in this case to contradict his testimony now given. His testimony in that case was in accordance with the exigencies of the occasion. His uncorroborated testimony, therefore, in view of his inconsistent testimony before given, is unsatisfactory. The testimony of the witnesses Phelps and Edmonds is wholly rejected, because no notice of such testimony was given in the answer or required by the statute; consequently, there was no issue to which their testimony could be made applicable, and the testimony was improperly taken. I would suggest, generally, that, in

Points decided.

[May.]

practice before the examiner, counsel are in the habit of insisting upon introducing incompetent testimony, with the hope, I presume, that it may be considered by the court. But it is merely a waste of time, and money, to take such testimony, as the court must reject it, when it comes to an examination of the case.

Let there be a decree in favor of complainant, sustaining the third and fourth claims of re-issued letters patent No. 6831, and the third claim of letters patent No. 173,261; and a reference to the master for an accounting for the profits arising from the use by defendant of the infringing machines up to the present time; and that a perpetual injunction issue, restraining the future use of the inventions by defendant.

GEORGE A. COFFIN ET AL. v. PORTLAND ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

MAY 12, 1886.

1. DEDICATION TO PUBLIC USE.—A dedication of real property to public use as a levee or landing on the bank of a navigable water implies and vests in the public a right to use the same without a grantee being named or in existence; and it rests with the legislature, as the representative of the public, to regulate such use and to promote the same by improving the premises directly or through the agency of the municipal corporation within whose limits the same are situated or otherwise.
2. IDEM—ACCEPTANCE AND CONTINUANCE OF.—No formal acceptance of such dedication is necessary; nor does the existence of such easement depend on the extent of the use or improvement of the premises, or that they are used or improved at all.
3. DEDICATION FOR A "PUBLIC LEVEE."—In 1850 the occupants of the Portland land claim dedicated a strip of ground on the river, within the limits of the town they had laid out thereon, as a "public levee," and so designated it on the plat of the survey: *Held*, That the intent and understanding was to dedicate the property to public use as a landing-place for the use of water craft and the transfer of freight and passengers to and from the river.
4. POWER OF THE STATE OVER DEDICATION TO PUBLIC USES.—The state may regulate the use of and improve the public landing, and authorize the collection of tolls for the maintenance of wharves and warehouses thereon, but it has no interest in the property, and cannot devote or sub-

1886.]

Opinion of the Court—Deady, J.

ject it to any use clearly inconsistent with the purpose of the dedication, and if it undertakes to do so, the property is not affected by the act, nor will it thereby revert to the donor or his heirs.

5. ACT OF 1885 CONCERNING THE LEVEE.—The act of 1885 (Sess. L. 160) construed to give the P. & W. V. Ry. Co. the right to use and improve the levee as a public landing by the construction of wharves, warehouses and terminal railway facilities thereon for the public use.

Before DEADY, District Judge.

Mr. James G. Chapman, for the plaintiffs.

Mr. Alfred H. Tanner, for Portland.

Mr. Charles A. McDougall, for the P. & W. V. Ry. Co.

DEADY, J. This suit is brought by the plaintiffs to have declared and enforced a resulting trust in a parcel of land in Portland known as the "Public Levee."

The case was heard on a demurrer to the bill on the grounds of a want of equity therein and of jurisdiction in the court.

From the bill it appears that the plaintiffs are citizens of Oregon, and the defendants are corporations existing under the laws of Oregon—the one a municipal and the other a private corporation; that prior to September 27, 1850, Stephen Coffin, D. H. Lownsdale and W. W. Chapman were in the occupation, as partners, of a tract of land containing about six hundred and forty acres, situate on the west bank of the Wallamet river, including said public levee, and then known as the Portland land claim; that prior to said date said occupants caused said claim to be laid off in lots and blocks, streets, public squares and places, including a public levee on the bank of the river between the east line of Water street and low water mark, and extending southerly from the south line of Jefferson street about five hundred and twenty feet, and about one hundred and fifty feet in width at the north end and three hundred and fifty feet at the south end, and a map thereof to be made, commonly known as the Brady map, and then and thereby dedicated said levee to the public, and for more than twenty years thereafter jointly and severally sold and conveyed lots in the town of Portland by said map; that on March 10, 1852,

Opinion of the Court—Deady, J.

[May.

said occupants, in order to comply with the donation act of September 27, 1850, and become settlers thereunder, divided said claim between themselves, whereby said levee was included in the donation of Stephen Coffin, who, during the year 1854, received a patent certificate for the same, upon which a patent was afterwards issued to him by the United States; that at the time of said division said occupants covenanted with each other as follows: "That he will fulfill and perform all contracts and agreements which he has heretofore entered into with the others or with each of them, or with other persons respecting the said tract of land or any part thereof;" that said Coffin continued to recognize said dedication, and between the issuing of said patent certificate and January 23, 1865, sold and conveyed lots within his donation by said Brady map; that the inhabitants of Portland were incorporated by the act of January 23, 1851, and have ever since existed as a municipal corporation by that name, and the common council thereof on April 29, 1852, adopted said Brady map, and the same was and continued to be in general use with the knowledge of said Coffin from and after the spring of 1850; that on January 23, 1865, said Coffin executed a deed to Portland, "without consideration" of said "levee tract, in trust for the use of a public levee or landing," reserving therein to himself all rights for a public ferry thereon, but Portland had no power to take said conveyance, or execute the trust therein contained, and the same is null and void, and in the year 1871, in consideration of two thousand five hundred dollars, Coffin executed another deed to Portland, relinquishing the alleged ferry right.

The bill then avers that the deed of 1871 gave Portland no additional right in the premises, the same having been previously dedicated by the grantor, both by parol and the deed of 1865, and was only intended to extinguish said ferry right and to enable the corporation to hold the premises "in trust for the use of a public landing or levee," discharged of such right; that in 1871 said premises were of the value of fifty thousand dollars, and that in obtaining the conveyance of that year, Portland "falsely and fraudu-

1886.]

Opinion of the Court—Deady, J.

lently represented" that it intended "to hold and devote said premises for the use of a public levee or landing," by reason of which representations said Coffin was induced to make the same, and Portland had no right to take said conveyance except to extinguish said ferry right, and the same is void for any other purpose; that neither Portland, the state nor the public has ever made any use of the premises as a public levee or landing; that said dedication was made in the belief that the same would be advantageous to the public and Portland, but it is contrary to public policy for either Portland or the state to maintain a free public levee or landing at any place in the former, nor could any charge be made for the same consistent with the dedication; that since said dedication was made the unimproved shores and banks of rivers have ceased to be used as a place for the deposit and shipment of goods, and the custom is to use wharves and warehouses, in the construction of which within the limits of Portland there has already been expended two million dollars, and there is yet river front owned by private persons that may be devoted to such purpose; that the premises cannot be used as a landing or levee unless improved, and it would be contrary to law and public policy for Portland to attempt to collect taxes from the owners of private wharves or other property for the purpose of constructing free wharves thereon, and to become liable for freight deposited there; that the primary purpose of the dedication was for "a public levee," which "is doubtful and uncertain and unknown to the law, science or history," and therefore void.

That by the act of February 24, 1885, entitled "An act to provide for the construction to the city of Portland of the uncompleted portion of the narrow gauge system of railways now in operation in western Oregon, and to provide terminal facilities therefor upon the public grounds in said city," the trust created by said dedication is "renounced and abrogated by the sovereign legislative power of the state," and it is now unlawful for Portland to hold said premises as a public levee, and there arises thereby a resulting trust of said premises in favor of complainants; that said railway

Opinion of the Court—Deady, J.

[May,

company claims the right under said act of 1885 to appropriate the premises to its use as a depot on making compensation to Portland for any right it may have therein, and "is striving and threatening to obtain possession" of the same for that purpose; that the premises are of the present value of seventy thousand dollars, and Portland has expended four thousand dollars thereon; that the plaintiffs are the heirs at law of Stephen Coffin, except Albert Marvin, the husband of Lucinda Marvin, and before commencing this suit they gave notice to Portland that they were willing to repay it all sums of money expended on said levee; wherefore they pray that a resulting trust of said premises be declared in their favor and enforced against the defendant Portland by requiring it to convey the same to the plaintiffs, and that the railway company be declared to have no right to enter upon or use the premises.

The dedication of this property, as a public levee or landing, by Stephen Coffin in 1850, and the continued recognition thereof during his life, is stated and admitted in the bill. The naked dry legal title was all that remained in him thereafter and that passed to Portland by his deed of 1865, subject to this easement. The reservation therein of a private ferry right or landing on the premises was probably void, as being inconsistent with the prior unqualified dedication of the premises to the use of a public levee or landing. This being so, nothing passed by the deed of 1871, which according to the bill was only intended to extinguish this alleged ferry right.

In short the transaction had no other effect than to give an old pioneer a few hundred dollars, to smooth the path of his declining years, and this was probably all that was intended by those who managed the affair.

But it is said, that the original dedication is void for want of certainty, because the term "levee" is unknown in the sense of a landing place "to history, science or law."

The word comes to us from the French and in its primary sense signifies a *rising*. But its signification has been much enlarged. Among other things it is used to denote an embankment on the margin of a river to prevent inunda-

1886.]

Opinion of the Court—Deady, J.

tion—particularly on the lower Mississippi. And when this embankment is used as a landing place or quay, as at New Orleans, the levee and the landing became convertible terms. From this metropolis of the south and southwest, this use of the word passed up the river and its tributary the Ohio, to St. Louis, Louisville, Cincinnati, Wheeling and Pittsburgh, where the open bank or slope of the river was used as a landing-place for the use of water craft and the transfer of freight and passengers to and from them. And doubtless this is the sense in which it was used by the proprietors, Coffin, Lownsdale and Chapman, when this dedication was originally made, who, as it is well known, all came from the region of the Ohio river, where the slope or rise from the river in front of the town is or was commonly left open to the public and used as quay, landing or levee, sometimes with the aid of wharf-boats fastened to the shore.

And this is confirmed by the fact that as late as 1865 Coffin uses the terms “public levee” and “landing,” in the deed of that date as synonymous.

And such was also the common and public understanding of the term in this country, as appears from its use by the legislature in section 10 of the act of 1851, incorporating Portland, which gives power to the council “to lay out, regulate and improve the streets, lanes, alleys, sidewalks and *public levees*, within said corporation,” and “to provide for the removal of all * * * obstructions *in* the streets, lanes or alleys, or *on* the *public levees* thereof.”

Here the “levees” are classed with the other highways or public easements within the corporation, and placed under its control. And the very discriminating use by the legislature of the prepositions “in” and “on” indicates a practical knowledge of the subject—an obstruction being, so to speak, *in* a street, which is or may be enclosed on both sides, and *on* a levee, bank or landing that is open on the river side at least.

In *Parish v. Stephens*, 1 Or. 59 and 73 (1853), which was a suit involving the fact of a similar dedication of the river front of the Portland claim north of Jefferson street, the bank is characterized in the opinion of Olney, J., as a

"highway and public levee," and in the "supplementary opinion" of Williams, Ch. J., as the "public levee." On the well known map of Portland, compiled by Alex. J. Graham, from "Brady's, Travalliot's and City Maps" and published by S. J. McCormick in 1859, the premises in question are represented as open ground, without a street running through them, and designated the "public levee."

In the litigation arising in towns on the Mississippi and Ohio rivers, questions relating to the dedication and use of the river bank or front as a landing for the convenience of river commerce have been considered and decided on the theory that a dedication of such ground to public use implies and vests in the public a right to use the same as a highway, quay, landing or levee, without any grantee being named or in existence; and that the legislature, as the representative of the general public, may regulate such use and promote the same by the improvement of the premises, directly or through the agency of the corporation within whose limits the same are situated. (*Cincinnati v. White*, 6 Pet. 435; *Barclay v. Howell*, Id. 498; *New Orleans v. U. S.*, 10 Pet. 662; *Rowan v. Portland*, 8 B. Mon. 232; *Godfrey v. Alton*, 12 Ill. 29; *Gardner v. Tisdale*, 2 Wis. 153.)

And when, as in this case, the dedication is unconditionally made to a public use, as a levee or landing place, no formal acceptance of the same is necessary; nor does the existence or continuance of the easement depend on the extent of the use or improvement of the premises, or that they are used or improved at all; and it is even doubtful if the same can be lost by the adverse occupation of the premises by private parties for any length of time. (2 Dill., 3 Ed. M. C., section 675.)

Taking the case made by the bill, by the facts stated therein, without reference to the averments concerning their legal effect, which are more in the nature of argument than otherwise, it appears that the use of this property, as a highway or landing place, was given to the public by the plaintiffs' ancestors long prior to the execution of and irrespective of the deeds of 1865 and 1871.

At any time thereafter the legislature, as the representa-

1886.]

Opinion of the Court—Deady, J.

tive of this public, had the power to authorize the corporation of Portland, to improve the premises, as a landing, and to make regulations concerning the use of the same, or to make provision to that end directly, or to leave the property in its natural condition, subject to such use, as a landing, as could under the circumstances be made of it. It might also construct or authorize the corporation or any individual to construct and maintain wharves and warehouses thereon, and impose and collect a toll for the use of the same, sufficient, at least, to defray the cost and expense of these aids and conveniences to travel and transit thereon.

But neither the state nor Portland has any interest in this property to dispose of; nor can either of them devote or subject it to any use clearly inconsistent with the purpose of the dedication. And if the legislature should undertake to do so, the property would not therefore revert to the donor, or the easement be lost to the public, but any person injured thereby might maintain a suit against the proper parties to enjoin the same.

It follows from these premises that so far as the plaintiffs are concerned, it matters not whether Portland has or ever had any authority to regulate the use of or improve the premises, for the purpose of the dedication; or whether it could or did take any interest therein by operation of the deeds of 1865 and 1871.

But it may not be amiss to refer briefly to the legislation bearing on that subject. By the act of 1851, *supra*, as we have seen, Portland was authorized to regulate and improve the "public levees" within its limits, including this one, of course, as well as the bank of the river north of Jefferson street, which was subsequently (1861) found not to have been dedicated (*Lownsdale v. Portland*, 1 Deady, 2), and to remove all obstructions therefrom. By the same act the corporation was authorized "to acquire" real property for the use of the corporation. This act was superseded by the one of October 14, 1864 (Sess. L. 2), which dropped the word "levee," and provided, among other things (sec. 2), that the corporation might "purchase, hold and receive"

Opinion of the Court—Deady, J.

[May.]

real property within its limits for "public buildings, public-works, and city improvements." This was followed by the act of October 24, 1882 (Sess. L. 144), which was a mere compilation of the act of 1864, and sundry additions and amendments made thereto in the meantime, but made no change in the law in this respect; and section 2 of the act was again amended by the act of November 25, 1885 (Sess. L. 102), without being altered in this particular.

From this it appears that since October 14, 1864, if not before, Portland has been authorized "to purchase, hold and receive" real property for "city improvements." This is a general and comprehensive provision; and unless limited in its operation by some other enactment, to which attention has not been called, it includes property intended for a public square, park, landing, levee, or the like. (2 Dil. M. C., 3d ed., secs. 562, 563, 564.) And under the grant of power contained in section 37, subdivisions 1 and 2, of the act of 1864, and the following ones, to levy and collect taxes for general municipal purposes, and for "any specific object" within the authority of the corporation, it is not apparent why Portland is not authorized to improve such square, park, landing or levee in any way that may be calculated to promote its usefulness or improve the city.

The fact that the river front is generally in the hands of private parties, on which warves and warehouses are maintained by private enterprise, has no bearing on the question of the authority of Portland in the premises, or the power of the legislature to confer, withhold or withdraw the same at pleasure. What is a wise or the best policy in the premises, is a matter for the legislature in the first instance, and the corporation in the second. Under the circumstances, it would be sheer assumption for the court to say that it is contrary to public policy for Portland to have a public landing or levee on the river bank, or to improve and maintain the same, either directly or through the agency of third persons.

The act of February 24, 1885 (Sess. L. 100), which the plaintiffs allege is a "renunciation" by the state of the trust arising from the dedication of this property to public uses,

1886.]

Opinion of the Court—Deady, J.

is largely a mass of senseless and redundant verbiage; but, so far as this case is concerned, it may be shortly stated, as a grant or license to the defendant—the Portland and Wal-lamet Valley railway company, then and now engaged in constructing a road between Portland and Dundee—of the use of the levee for a depot, and the wharves and warehouses necessary and convenient for receiving, storing and shipping freight, on condition, among others, that said company shall not charge any vessel for “dockage” while receiving or discharging cargo at any wharf on the premises.

The act also contains a provision to the effect that nothing therein shall be construed “to take away any pecuniary (?) or property rights” that Portland may have in the premises, and which the state cannot “lawfully appropriate;” nor to deprive the same of any “legal claim or remedy it may have to (?) damages in consequence of the appropriation of said public levee;” and that the company shall not sell or assign “the premises or rights” thereby granted, otherwise than as an “appurtenant” of said railway.

As the state has no power to “appropriate” or “grant” this property otherwise than to provide for and regulate its use as a public landing, the language of the act is not well chosen and is susceptible of a construction that would give it effect beyond the power of the legislature in the premises.

But giving it effect within such power, and construing it accordingly, as the court is bound to do, if it can, the act is a grant to the defendant of the right to improve and use the premises as a public landing, with the added facility of direct and immediate railway connection therewith. The company is so far the agent of the state, and in consideration of the advantage of being allowed access to ship navigation at this point and the right to maintain a depot thereat, undertakes to furnish the public with suitable wharf and warehouse facilities there for the transaction of business, including free “dockage” for vessels engaged in loading or discharging cargo.

And as Portland has no “pecuniary” or other right in this property, except as trustee, and then only so far as the legislature may provide or permit, it is not apparent what

Opinion of the Court—Deady, J.

[May,

claim it can have for damages in consequence of its "appropriation to such uses and purposes. (2 Dillon Mun. Corp., 3d ed., secs. 567-573.)

Nor is it apparent how the operation of this act impairs the obligation of any contract concerning this property—and especially to the injury or prejudice of these plaintiffs. For no one can be heard to question the validity of an act of the legislature on the ground that it impairs the obligation of a contract, without showing that such impairment works an injury to him of which the law will take cognizance.

The learned counsel for the plaintiffs states their case in this respect on this wise:

"In the case at bar the federal question of the power of the legislature to devote the property to the railroad's use, forms an ingredient in the original cause of suit. The right of reversion to the donor or his heirs, and the power of the legislature to destroy that right of reversion, are the principal points in the case; and a determination of the power of the legislature is indispensable to a determination of the suit upon the other point. * * *

"The relief prayed for will be allowed or rejected according to whether the act be determined to be valid or invalid."

But if the act is invalid for any cause, no one can claim any right under it, and for the same reason, no one can be deprived of any right by it. The argument involves the novel proposition that the legislature, by the passage of a void act, whereby it undertook to divert the use of this property from the public to a private corporation, has caused the right of the public therein to be forfeited, and the property to revert to the donor or his heirs, discharged from the easement. This is making one person answer for the sins of another, with a vengeance. The mere statement of the proposition ought to be a sufficient answer to it. The public, to whom the use of this property was dedicated by Stephen Coffin, is not responsible for the illegal acts of the legislature—and for that matter they do not bind or affect any one.

But it is not conceded that there is any implied contract accompanying or growing out of this dedication, that the

1886.]

Points decided.

public will make any particular use of the premises, except when and as it may suit its convenience or the public good; nor that the same shall revert to the donor or his heirs in case of any failure of the public to use the same or any attempt on the part of the state or Portland to divert the property to some use other than the one intended by the donor.

Where the fact of dedication of a street or landing is in dispute, non-user is evidence, more or less cogent, according to circumstances, against a dedication. But where, as in this case, the dedication is admitted, the evidence of non-user is immaterial. The right to the use, once admitted, is not affected by it. (*Barclay v. Howell*, 6 Pet. 505.) Property dedicated to public use does not revert to the donor, unless, it may be, where the execution of the use becomes impossible; and if such property is appropriated to an unauthorized use, a court of equity will compel a specific execution of the trust, by restraining the parties engaged in the unlawful use or by causing the removal of obstructions or hindrances to the lawful one. (*Barclay v. Howell*, 6 Pet. 507; see also 2 Dillon Mun. Corp., 3d ed., sec. 653.)

The bill is clearly without equity; and in my judgment the case made by it does not involve a federal question.

The demurrer to the bill is sustained, and the same is dismissed.

**HARDT v. LIBERTY HILL CONSOLIDATED MINING AND
WATER COMPANY ET AL.**

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MAY 16, 1886.

1. **INJUNCTION—MODIFICATION OF ORDER—SERVICE OF PAPERS.**—The rules and practice of the circuit court of the ninth circuit, on an order to show cause why an injunction should not be modified, require copies of all the moving papers to be served with the order; and mere supporting affidavits cannot be filed in opposition to the affidavits showing cause, where the latter only controvert the moving affidavits, and do not set up any new affirmative matter constituting a defense.

Opinion of the Court—Sawyer, C. J.

[May,

2. **MINES AND MINING CLAIMS—MINING DEBRIS—IMPOUNDING DAMS.**—No dam for impounding mining debris, erected in mountain rivers, should be held sufficient to protect riparian and other proprietors below, where the determination of their sufficiency rests upon the opinions of engineers, apparently equally intelligent, and those opinions are at variance; nor upon any evidence not of the most unquestionable and satisfactory character.
3. **SAME.**—It is not the province of the court to speculate upon the sufficiency of means adopted by trespassers for the protection of the parties trespassed upon, or the sufficiency of such means to resist the action of the forces of nature, where the data for a correct determination are uncertain and unreliable, and where an error in judgment is liable to work great injury to the latter.

Before SAWYER, Circuit Judge, and SABIN, District Judge.
IN EQUITY.

Mr. A. L. Rhodes and *Mr. A. L. Hart*, for complainant.

Mr. James K. Byrne, for respondent.

By the Court, SAWYER, Circuit Judge. This is a suit similar to the somewhat noted *Mining Debris case*, 9 Sawy. 441, to enjoin defendants from discharging the debris resulting from hydraulic mining into Bear river, by means of which it is carried down and deposited upon the lands of defendant, who is a riparian proprietor in the Sacramento valley, on the river below. A preliminary injunction having been granted, one of the defendants, the Liberty Hill Consolidated Mining and Water company, constructed a dam across the river in the cañon below its mines, for the purpose of impounding the debris resulting from its mining operations, and preventing it from flowing down the river and injuring complainant. It now moves for a modification of the injunction on that ground, so as to be permitted to proceed with its mining. The defendant moves upon two affidavits of its engineers, describing the dam and its mode of construction, and declaring their opinion that it is wholly sufficient to permanently impound the debris and obviate all injury for the future. Complainant, in opposition, presents affidavits of two other engineers, who give their account of the construction and character of the dam, and express a decided opinion that the dam is wholly insufficient to accomplish the in-

1886.]

Opinion of the Court—Sawyer, C. J.

tended purpose. The defendant replies by affidavits of seven other parties sustaining the position of defendant, and contradicting complainant's affidavits in some particulars, to which complainant again responds by several counter affidavits. The second batch of both respondent's and complainant's affidavits is objected to by the opposing party as not being admissible under the rules and practice of the court. The respondent in the case is the moving party, and the rules and practice in this court require that all the papers and affidavits upon which the motion is based shall be served with the notice of motion or order to show cause, and that supporting affidavits will not afterwards be received, unless, in the discretion of the court, the moving party is permitted to reply where the other party sets up *new affirmative matter constituting a good answer to the application*. In that case the second batch of affidavits filed in response to complainant's affidavits in answer to the order to show cause, all related to the character, structure, and sufficiency of the dam for the purpose intended, and cover the same ground precisely as the moving affidavits, only they go more minutely into the particulars of the facts, in response to the more particular statement of facts given in the complainant's affidavits, and state the then present condition of the dam. We do not think the complainant's affidavits, in response to the order to show cause, presented *any new affirmative matter constituting a defense*, within the meaning of the rules and practice of this court, that should entitle the moving party to reply. If the respondent desired to use them, we think these supporting affidavits, so far as they relate to the condition of the dam at the time the order to show cause was obtained, should have been served as a part of the moving papers, so that complainant could have an opportunity to reply specifically to each fact. The affidavits are *ex parte*, no opportunity for cross-examination having been afforded. As they were not served as a part of the moving papers, if they are to be considered at all, or even so far as they relate to the subsequent condition of the dam, we think the second batch of affidavits in response should also be considered.

The respondent originally rested its application upon the two affidavits of the engineers, which its counsel, doubtless, deemed sufficient, describing the plan and construction of the dam, and giving their opinion of its operation and efficiency, and the complainant in the bill put in two counter affidavits of other engineers, controverting the positions in some particulars of their opponents. Complainant might well be content to oppose his two witnesses to the two of the moving party upon the points covered by the affidavits, when he would not have done so had they been supported in their position by seven other witnesses. To receive these seven supporting affidavits, and reject those offered by complainant to contradict them and support his own, would be giving respondent an unfair and inequitable advantage. If one set of supporting affidavits is considered, the other must be also, and, as there are some peculiarities in the case, it is perhaps best to consider both. But, under the view we take in this particular case, it is a matter of little consequence, except so far as it is desirable to insist upon correct practice, how we rule on this point, for the result must be the same in either event.

Upon the affidavits of the moving party, both originally and subsequently filed, taken either with all the affidavits of the complainant, or with the affidavits of the two engineers alone, presented by him, we are by no means satisfied that the dam in question—a dam forty feet high, erected on a bed of debris already sixty feet deep, brought down from the mines as the result of previous washing—is sufficient to either, permanently, or for any considerable period of time, accomplish the intended purposes, and adequately protect the complainants from the mining debris to be discharged into Bear river. In the face of the conflicting views of engineers on the subject, it is impossible to be satisfied of the sufficiency of this dam. The whole matter rests in mere opinion. We have no right to blindly speculate upon matters of such consequence. With our limited facilities, we cannot foresee, with reasonable certainty, what may occur in these mountain rivers, confined in deep cañons, which sometimes become irresistible torrents.

Nothing short of the attribute and prescience of omniscience is equal to the task of determining the absolute sufficiency of such a dam, and nothing should be accepted as sufficient, except upon the most indisputable, and demonstrative evidence. Where the earth and other material displaced in mining are removed from their bed and cast into the main rivers in the mountains, they at once become subject to the operation of the tremendous forces of nature, against which the puny efforts of man can interpose but feeble barriers, at best—can accomplish but little. A small beginning, arising from slight causes, originating in accident or design, or from the active forces of nature, may soon develop into a destructive breach in a dam like that in question. Malice may instigate the application of dynamite, and the blowing up of the dam, as was claimed by the owners to be the case—although it is not a known fact—with the English dam some three years ago, and is now claimed with respect to the debris dam in Humbug cañon. The English dam had been constructed with the highest degree of engineering skill, by parties whose *highest interests* required that it should be absolutely sufficient and safe under all contingencies; yet, through accident, malice, the forces of nature, or some other cause unknown, it gave way, and precipitated its destructive flood of water, in ten hours, upon the plains eighty-five miles distant below, breaking, in several places where the water channel was more than a mile wide, levees that had withstood the ordinary floods of the rainy seasons, and doing great damage to the surrounding country. (*Debris case*, 9 Sawyer. 484, 766.)

The lamentable failure of the state in building debris restraining dams under the direction of its own engineers, after an expenditure of half a million of dollars, and the equally unsuccessful efforts of private mining companies shown in the *Debris case*, 9 Sawyer. 480, 763, furnish a warning against relying too confidently upon the skill or opinions of engineers, however eminent. The restraining and impounding dams erected by the state, whose interest it was to make them sufficient, were in the plains, on comparatively low grades. That of the English

dam, doubtless, was in a more difficult position, and was a water dam merely. These were on a larger scale, it is true, and, possibly, some of them in more dangerous positions, than the present one; but, if so, it is only a difference in degree. The same principles of physics and dynamics underlie and control and govern them all. It is not for us, with our limited faculties, to estimate and speculate upon possibilities, and measure off and lay down a line indicating just how far trespassers may encroach upon the domain and overpowering forces of nature, within the supposed limits of reasonable possibility or probability, with safety to the rights of the parties below upon whom the trespasses are committed. A court having power to enjoin the nuisance might, with just as much propriety, refuse an injunction against the erection by the owner on his own premises of a magazine for the storage of gunpowder and dynamite, adjoining and next to his neighbor's house, upon the evidence of experts in the matter that the magazine is constructed with the most perfect skill, and that it is and will be guarded by all the means for securing safety known to science. Such a magazine might never explode, yet it is liable to explode at any moment. And the same would be true of one of these restraining debris dams, built across one of these main mountain rivers, liable to become roaring torrents. It might not give way for years, yet it is liable to do so at any time during a flood.

If restraining dams must be relied on by the inhabitants of the valleys of California to protect them from destruction from mining debris, it would seem that such dams should be constructed by or under the supervision, and in accordance with the ideas, of the parties in danger and liable to be injured, rather than under the supervision, and according to the views, of those who commit the trespasses and perform the acts which give rise to the danger, and whose interests are not endangered, or in any respect liable to suffer. The party in danger should be the party to determine the measure of his protection—not the party creating the danger for his own benefit.

It is for the pecuniary interest of hydraulic miners to get

out as much of the precious metals as possible, with the least possible expense. The interests of the moving party in this matter are simply to tide over the present, and escape injunctions until its mines can be worked out. What happens afterwards is no concern of his. As human nature is constituted, the action of the parties so situated, set in motion by an application of the coercive powers of the law, in the erection, at their own expense and according to their own ideas, of impounding dams for the sole protection of the rights of those upon whom they commit trespasses, should be scrutinized with jealous care by those who administer the laws, and whose imperative duty it is to see that each one shall so use his own as not to injure his neighbor. It may well be doubted whether any restraining dam, however constructed, across the channels of the main mountain rivers, of a torrential character, should be accepted by the courts as a sufficient protection to the occupants of land in the valleys below liable to be injured. But if any are to be accepted, they should only be those the ample sufficiency of which has been established upon testimony of the most unquestionable and satisfactory character. Nothing should be left to conjecture. This is not a matter of a single dam. A rule must be laid down applicable to the entire gold-bearing region. It will be no use to restrain one mine, if others are allowed to run. Besides, it would be unjust. All doing injury must be stopped or restrained from contributing to further injury, or none.

In discussing this subject in the *Mining Debris* case, 9 Sawy. 537, we said, respecting the general practicability of building safe impounding dams:

“As is usually the case, the views of different engineers and experts, distinguished in their profession, differ widely upon the point of practicability and safety. The larger number of witnesses called, and much the larger amount of testimony in this case, so far as mere opinion goes, are, doubtless, in favor of the practicability, *if sufficient means are furnished*. But all the practical experiments heretofore made, at great expense, under the supervision of the state and of competent engineers, have been lamentable failures.

The dams constructed were, doubtless, in many particulars defective. But what guaranty has the court, and those whose lives and property are at stake, that any future works of the kind will not, also, be defective? As at present advised, with some knowledge of the tremendous forces of nature, we cannot undertake to say, upon the mere opinion of experts, generally at variance, as in this case, however competent, that the scheme would be practicable and safe. We cannot define in advance what works shall be sufficient, and authorize the continuance of the acts complained of, upon the performance of any prescribed conditions. In view of past experience here, and, elsewhere, with the damming up of waters, and of the wide difference of opinion of competent engineers on the subject, it is clear that *we should not be justified in an attempt to prescribe in advance any kind of a dam under which a large community shall be compelled to live, in dread of a perpetual, seriously alarming, and ever present menace.*"

My associate added: "Besides, it is a very serious question in my mind whether any person or community can or ought to be required to submit to the continuous peril of living under or below such a dam as this must necessarily be, if it is made high enough to impound the coarse material; and this, merely for the convenience of another person or persons in the pursuit of his or their private business. It may be likened, at least, to living in the direct pathway of an impending avalanche." (Id. 551.)

The more we reflect upon this point the more confident we are in the soundness of the views there expressed. We cannot know whether the dam in question will be sufficient for the purposes indicated, or whether it will be kept in repair, and continue to be adequate; and we have no right to speculate upon what may happen at the expense of or peril to the safety of complainant, and numerous others occupying similar situations. We might as well undertake to prescribe in advance the kind of dam that would be deemed and held sufficient and satisfactory as to determine now whether this dam will now be, and hereafter continue to be, adequate to the purposes intended. We cannot undertake

1886.]

Opinion of the Court—Sawyer, C. J.

to do either. We cannot undertake to set bounds to the operations of the forces of nature, where the rights of others are liable to be thereby seriously injured should these bounds be erroneously fixed.

Although we do not claim to be experts in these matters, yet, with some knowledge of physics and the laws which govern the forces of nature, and with no inconsiderable observations of the results of their operation, we cannot say, even upon the very intelligent affidavits of the moving party's witnesses, without considering the complainant's affidavits at all, that we are satisfied that the dam in question is, or will be, sufficient for the purposes intended, or at all adequate to protect the complainant, and others similarly situated, from further injury. And this want of satisfaction is largely increased by the opposing opinions and statements of the engineers, whose affidavits, apparently equally intelligent and reliable, were taken and presented on behalf of the complainant. We are fully satisfied that the motion to modify the injunction should be denied, and that the order suspending its operation should be vacated.

Both witnesses and counsel state, that they have constructed this dam upon the suggestion of the court upon the subject, apparently intimating that, having done so, the court is committed to their view as to their rights. If this is the supposition, it is not perceived how any such idea could have been derived from anything said in the *Debris* or any other case. Indeed, all that was said in the discussion of the questions in that case, as will be seen from the extracts given, leads in a contrary direction. The case was a new one, involving vast interests. The manifest hardship of stopping hydraulic mining upon mining investments was painfully evident to the court; and being exceedingly anxious not to interfere with those interests any further than was absolutely necessary to protect the rights of others wrongfully injured by these operations, and wishing to be in a position to relieve the mining interests from any unnecessary hardship, should any change of conditions or other contingency arise by which it could properly be obviated, it was in conclusion observed:

Points decided.

[May,

"As it is possible that some mode may be devised in the future for obviating the injuries, either one of those suggested, or some other successfully carried out, so as to be both safe and effective, a clause will be inserted in the decree giving leave on any future occasion, when some such plan may have been successfully executed, to apply to the court for a modification or suspension of the injunction."

The clause suggested, whether wisely or not we do not yet know, was accordingly inserted in the decree. But it in no degree indicated what would be deemed "safe and effective" to protect the interests of the parties in such sense as to justify a modification of the decree; and there was, certainly, no indication as to what means would be "safe and effective" as to the mine then in question, and much less at the point where the dam now under consideration is located.

Let the motion be denied, and the order temporarily suspending the operation of the injunction against the Liberty Hill Consolidated Mining and Water company be vacated, and the injunction reinstated.

ROSENBAUM v. BOARD OF SUPERVISORS, ETC.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MAY 24, 1886.

1. **MANDAMUS—JURISDICTION OF THE CIRCUIT COURT—WHEN GIVEN.**—The United States circuit court has no jurisdiction to entertain an application for a *mandamus*, originally presented therein, except as ancillary to some other proceeding establishing the demand, and reducing it to judgment, and in the nature of process for executing such judgment.
2. **SAME—JURISDICTION—REMOVAL FROM STATE TO UNITED STATES COURTS—CONSTRUCTION OF ACT OF CONGRESS OF 1875, SECTIONS 1, 2, 716.**—Jurisdiction of a writ of *mandamus* cannot be conferred upon the United States circuit court by commencing the proceeding in the state court, and then removing it to the United States circuit court, under the act of congress of 1875.
3. **SAME—WHAT IS—ACT OF CONGRESS OF 1875, SECTIONS 1, 2.**—A *mandamus* is not "a suit of a civil nature, at law or in equity," within the meaning of the act of congress of 1875.
4. **SAME—CODE CALIFORNIA, SECTIONS 1034, 1086.**—Under the California code a *mandamus* is not regarded as an action at law or a suit in equity, in

1886.]

Opinion of the Court—Sawyer, C. J.

the ordinary sense in which those terms are used; but as a special proceeding to afford a remedy where there is not a plain, speedy, and adequate remedy "in the ordinary course of law."

Before SAWYER, Circuit Judge.*

Mr. A. L. Rhodes, for petitioner.

Mr. John Lord Love, for respondents.

SAWYER, Circuit Judge. This court has no jurisdiction to entertain an application for a *mandamus*, originally presented herein, except as ancillary to some other proceeding establishing the demand, and reducing it to judgment, and in the nature of process for executing such judgment. (*Liebman v. San Francisco*, ante p. ; *McIntire v. Wood*, 7 Cr. 505; *Bath Co. v. Amy*, 13 Wall. 247, 248; *Graham v. Norton*, 15 Wall. 428; *County of Greene v. Daniel*, 102 U. S., 195; *Davenport v. County of Dodge*, 105 U. S. 242.)

Can jurisdiction be conferred upon the court by commencing the proceeding in the state court, which has jurisdiction in this form of proceeding, and then removing it to this court under the act of 1875? I am satisfied that it cannot. The case of *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81, 89, relied on by petitioner, does not reach the case. In that case the decision was rested expressly on the ground that section 2 of the act of 1875 is broader than section 1, since it contains no such limitation, as to the right of an assignee to sue in the national courts, as is found in section 1. In the case now under consideration, the language, "any suit of a civil nature, at law or in equity," in the second section, is no broader than the language, "all suits of a civil nature, at common law or in equity," in section 1. If, therefore, section 1 does not embrace this case, section 2, for like reasons, does not embrace it, and cannot give jurisdiction by removal. That section 1 does not embrace the case is clear, from the cases already cited; otherwise the court would have jurisdiction as an original proceeding instituted in this court. Therefore, section 2 does not reach it, or authorize a removal.

A *mandamus* is not "a suit of a civil nature, at law or in

*NOTE.—Affirmed U. S. Supreme Court, 120 U. S. 450.

Opinion of the Court—Sawyer, C. J.

[May.

equity," within the meaning of the act. Jurisdiction to issue writs of *mandamus* is not derived from section 1 of the act of 1875, and it was not derived from the corresponding provisions of the act of 1789, being section 11 of that act. This jurisdiction rests upon the provisions of section 716, the section upon this point corresponding to section 14 of the act of 1789. This point is expressly settled by the supreme court in *Bath Co. v. Amy*, 13 Wall. 248. If not a suit of a civil nature, within the meaning of the act of 1789, it cannot be one within the meaning of the same language in the act of 1875. A *mandamus*, therefore, is not a suit of a civil nature, within the meaning of any provision of the act of 1875, and is not removable under it.

So, also, under the code of civil procedure of California, a *mandamus* is not regarded as a "civil action," in the ordinary sense of that term. "Remedies are divided into two classes: (1) Actions; (2) special proceedings." (Code Civil Proc. 21.) Sections 22 and 23 define these remedies: "An *action* is an *ordinary* proceeding in a court of justice, by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Sec. 22.)

"Every other remedy is a *special* proceeding." See, also, sections 307, 1063. A *mandamus* is defined by section 1034, and it can only be issued "where there is not a plain, speedy, and adequate remedy in the *ordinary* course of law." (Sec. 1086.) It is issued only upon affidavit. (Sec. 1087.) Thus, under the California Code, a *mandamus* is not regarded as an "action at law" or a "suit in equity," in the ordinary sense in which those terms are used, but as a special proceeding, to afford a remedy where there is not a plain, speedy, and adequate remedy "in the *ordinary* course of law." Much less is it "an action at law or a suit in equity," within the provisions of either section of the act of congress of 1875, under which the courts have no jurisdiction of the writ, except where employed as ancillary to some other remedy, in the nature of an execution, to carry a judgment in some action into effect.

It may well be doubted, also, whether the case is a suit

1886.]

Opinion of the Court—Sawyer, C. J.

“of a civil nature, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars,” within the meaning of the removal act. It is not a suit to recover a judgment. There is no *ad damnum* clause in the petition, and no prayer for a money judgment. No ascertainment of value is sought or had. It is not a proceeding against the city of San Francisco, or any corporation or person alleged to be liable for any money demand whatever. It is merely a proceeding against certain officers personally, in their official capacity, who, it is alleged, refuse to discharge a public duty imposed upon them by law, for the purpose of setting them in motion,—a proceeding to compel them to act; to discharge an official duty. If the writ issues, it will of itself, alone, afford no remedy. When respondents act, only one step towards a remedy is made. The machinery is only started. If a tax is levied and raised, other actions may be necessary to establish the right, and other proceedings by *mandamus*, against other officers, may be necessary to obtain a remedy. In *Kurtz v. Moffit*, 115 U. S., 487, the supreme court, affirming the judgment of this court, held that a *habeas corpus* proceeding is not removable, because the matter in dispute does not involve a money value of five hundred dollars. The case of *Stewart v. Virginia*, 117 U. S. 613, also, appears to be directly in point on the question of money value.

It appears to me that the principle in these cases established is equally applicable to this case, and that it is not removable on that ground, also. But neither proceeding is a suit at law, within the meaning of the act of 1875. The jurisdiction in *habeas corpus* cases is derived from section 751, Rev. St., and not from the sections conferring general jurisdiction.

The case must be remanded to the state court, and it is so ordered.

Points decided.

[June,

GEORGE C. HICKOX v. S. G. ELLIOTT ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 14, 1886.

1. **CHAMPERTY—LIMITATION.**—The former ruling of this court in this case (10 Sawy. 415), that the agreement made in California, on February 10, 1874, between S. G. Elliott and Martin White for the loan and repayment of money, was to be performed in that state, and is not champertous; and that a suit may be maintained to enforce a security for a debt arising thereon, without reference to whether an action on the debt directly against the debtor can be maintained or not, considered and affirmed.
2. **RES JUDICATA.**—The obligation of White under said agreement, and the fact of his having performed the same, is *res judicata* since July 13, 1875, by the judgment of a competent court, in *White v. Elliott*.
3. **ATTORNEY'S FEES.**—A contract to pay an attorney four hundred dollars a month to attend to certain litigation: *Held*, to have been tacitly abandoned by reason of unforeseen delays in the progress of the litigation, and a gross sum allowed for the services of the attorney thereafter.
4. **CONCURRENT JURISDICTION—RECEIVER.**—The mere fact that a court has acquired jurisdiction of a suit between a grantor and grantee concerning their rights in certain property, and has taken possession of such property by the appointment of a receiver, does not prevent another court of concurrent jurisdiction from taking jurisdiction of a suit by a creditor of said grantor against said grantee, brought to set aside or postpone the conveyance of said property to the latter on the ground that it was made and received with intent to hinder and delay the plaintiff in the collection of his demand against the grantor; the relief sought may be granted without interfering with the possession of the receiver.
5. **ANSWER IN EQUITY.**—A defendant may answer an allegation in a bill that he has no knowledge, information or belief concerning the same, and the effect is to leave the matter to be proven by the plaintiff; but such answer is not equivalent, as evidence, to a denial of the fact alleged, nor can the defendant add a direct denial thereof to his answer that he has not even a belief on the subject.
6. **DEPOSITIONS—OBJECTION TO.**—A technical objection to evidence taken in a suit in equity must be made by motion to suppress before the cause is set for hearing.
7. **JUDGMENT—PROOF OF DEBT.**—A judgment creditor seeking to set aside conveyances anterior in date to his judgment, because made to hinder and delay him in the collection of his debt, may show by the proceedings in the case prior to the judgment, or other competent evidence, that his debt existed at or prior to the date of such conveyances.
8. **INSOLVENCY OF DEBTOR.**—It is not necessary to issue an execution on a judgment and have a return of *nulla bona* thereon, to show the insolvency of the judgment debtor; but the fact may be shown by any competent evidence that he has no property subject to the legal process of the court in which the judgment remains.

1886.]

Opinion of the Court—Deady, J.

9. **FRAUDULENT CONVEYANCE.**—It is not necessary that the grantee in a deed, made by a debtor to hinder and delay his creditors, should have actual knowledge of the grantor's intent, to make it void; but it is sufficient if he have knowledge of facts sufficient to put a prudent man on inquiry.
10. **CASE IN JUDGMENT.**—Conveyances made by an insolvent debtor to his brother, who was a large creditor, of all his property in the state, the value of the same being considerably in excess of the amount of the grantee's debt, without any settlement or agreement as to the values or cancellation or surrender of the evidences of debt held by the creditor, or any special change in the management of the property included in the conveyances, together with the fact that the grantor continued in the receipt of a large portion of the rents and profits of the property: *Held*, sufficient evidence of fraudulent intent of the grantor, and of the grantee's participation therein.
11. **DECREE FOR MONEY, WHEN NOT OTHERWISE SECURED WITHIN THE MEANING OF THE TWENTY-NINTH RULE.**—The plaintiff's debtor, being the equitable owner of certain real property, procured the same to be conveyed to his brother, with intent to thereby hinder and delay his creditors, and the grantee accepted the conveyance with knowledge of such intent; afterwards the plaintiff, having obtained a judgment against his debtor, filed a bill in this court to subject this property as an equitable asset in the hands of said grantee, to the satisfaction of his judgment, alleging the insolvency of the debtor, and obtained a decree thereon that the grantee pay the amount of the judgment within a certain time, and that in default of such payment the property in question be sold to satisfy the same; thereupon said grantee applied to have settled the amount of the *superedeas* bond to be given by him on appeal from said decree, claiming that the decree was "otherwise secured" within the meaning of rule twenty-nine of the supreme court, and therefore the bond ought to be taken in an amount not more than sufficient to secure the payment of the costs: *Held*, that the money ascertained to be due the plaintiff by this decree is not "otherwise secured" within the meaning of said rule, and the amount of the bond is settled at seventy-five thousand dollars—the amount of the decree, with three years' interest thereon, and ten per centum damages for delay, with the costs of the appeal, being about fifty-five thousand dollars.

Before DEADY, District Judge.

Mr. James K. Kelly and *Mr. C. E. S. Wood*, for the plaintiff.

Mr. Henry Ach, for the defendant Effinger.

Mr. Thomas N. Strong and *Mr. Charles R. Darling*, for the defendant, Joseph Holladay.

Mr. J. K. Weatherford, for the defendant Elliott.

DEADY, J. This suit is brought by George C. Hickox, a citizen of California, against Simon G. Elliott, Joseph Hol-

Points decided.

[June,

GEORGE C. HICKOX v. S. G. ELLIOTT ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 14, 1886.

1. **CHAMPERTY—LIMITATION.**—The former ruling of this court in this case (10 Sawy. 415), that the agreement made in California, on February 10, 1874, between S. G. Elliott and Martin White for the loan and repayment of money, was to be performed in that state, and is not champertous; and that a suit may be maintained to enforce a security for a debt arising thereon, without reference to whether an action on the debt directly against the debtor can be maintained or not, considered and affirmed.
2. **RES JUDICATA.**—The obligation of White under said agreement, and the fact of his having performed the same, is *res judicata* since July 13, 1875, by the judgment of a competent court, in *White v. Elliott*.
3. **ATTORNEY'S FEES.**—A contract to pay an attorney four hundred dollars a month to attend to certain litigation: *Held*, to have been tacitly abandoned by reason of unforeseen delays in the progress of the litigation, and a gross sum allowed for the services of the attorney thereafter.
4. **CONCURRENT JURISDICTION—RECEIVER.**—The mere fact that a court has acquired jurisdiction of a suit between a grantor and grantee concerning their rights in certain property, and has taken possession of such property by the appointment of a receiver, does not prevent another court of concurrent jurisdiction from taking jurisdiction of a suit by a creditor of said grantor against said grantee, brought to set aside or postpone the conveyance of said property to the latter on the ground that it was made and received with intent to hinder and delay the plaintiff in the collection of his demand against the grantor; the relief sought may be granted without interfering with the possession of the receiver.
5. **ANSWER IN EQUITY.**—A defendant may answer an allegation in a bill that he has no knowledge, information or belief concerning the same, and the effect is to leave the matter to be proven by the plaintiff; but such answer is not equivalent, as evidence, to a denial of the fact alleged, nor can the defendant add a direct denial thereof to his answer that he has not even a belief on the subject.
6. **DEPOSITIONS—OBJECTION TO.**—A technical objection to evidence taken in a suit in equity must be made by motion to suppress before the cause is set for hearing.
7. **JUDGMENT—PROOF OF DEBT.**—A judgment creditor seeking to set aside conveyances anterior in date to his judgment, because made to hinder and delay him in the collection of his debt, may show by the proceedings in the case prior to the judgment, or other competent evidence, that his debt existed at or prior to the date of such conveyances.
8. **INSOLVENCY OF DEBTOR.**—It is not necessary to issue an execution on a judgment and have a return of *nulla bona* thereon, to show the insolvency of the judgment debtor; but the fact may be shown by any competent evidence that he has no property subject to the legal process of the court in which the judgment remains.

1886.]

Opinion of the Court—Deady, J.

9. **FRAUDULENT CONVEYANCE.**—It is not necessary that the grantee in a deed, made by a debtor to hinder and delay his creditors, should have actual knowledge of the grantor's intent, to make it void; but it is sufficient if he have knowledge of facts sufficient to put a prudent man on inquiry.
10. **CASE IN JUDGMENT.**—Conveyances made by an insolvent debtor to his brother, who was a large creditor, of all his property in the state, the value of the same being considerably in excess of the amount of the grantee's debt, without any settlement or agreement as to the values or cancellation or surrender of the evidences of debt held by the creditor, or any special change in the management of the property included in the conveyances, together with the fact that the grantor continued in the receipt of a large portion of the rents and profits of the property: *Held*, sufficient evidence of fraudulent intent of the grantor, and of the grantee's participation therein.
11. **DECREE FOR MONEY, WHEN NOT OTHERWISE SECURED WITHIN THE MEANING OF THE TWENTY-NINTH RULE.**—The plaintiff's debtor, being the equitable owner of certain real property, procured the same to be conveyed to his brother, with intent to thereby hinder and delay his creditors, and the grantee accepted the conveyance with knowledge of such intent; afterwards the plaintiff, having obtained a judgment against his debtor, filed a bill in this court to subject this property as an equitable asset in the hands of said grantee, to the satisfaction of his judgment, alleging the insolvency of the debtor, and obtained a decree thereon that the grantee pay the amount of the judgment within a certain time, and that in default of such payment the property in question be sold to satisfy the same; thereupon said grantee applied to have settled the amount of the *supersedeas* bond to be given by him on appeal from said decree, claiming that the decree was "otherwise secured" within the meaning of rule twenty-nine of the supreme court, and therefore the bond ought to be taken in an amount not more than sufficient to secure the payment of the costs: *Held*, that the money ascertained to be due the plaintiff by this decree is not "otherwise secured" within the meaning of said rule, and the amount of the bond is settled at seventy-five thousand dollars—the amount of the decree, with three years' interest thereon, and ten per centum damages for delay, with the costs of the appeal, being about fifty-five thousand dollars.

Before DEADY, District Judge.

Mr. James K. Kelly and *Mr. C. E. S. Wood*, for the plaintiff.

Mr. Henry Ach, for the defendant Effinger.

Mr. Thomas N. Strong and *Mr. Charles R. Darling*, for the defendant, Joseph Holladay.

Mr. J. K. Weatherford, for the defendant Elliott.

DEADY, J. This suit is brought by George C. Hickox, a citizen of California, against Simon G. Elliott, Joseph Hol-

Opinion of the Court—Deady, J.

[June,

laday, William H. Effinger and Ben Holladay, as citizens of Oregon, to subject certain property, the legal title of which is now in Joseph Holladay, to the payment of a certain decree, heretofore given by the supreme court of Oregon, against Ben Holladay, on the ground that said property was assigned, transferred and conveyed to the former by the latter, to hinder and delay his creditors; and that the plaintiff is the assignee of said decree, in trust for Martin White, a creditor of said Elliott.

The case was before this court on November 12, 1884, on a demurrer to the bill, and the judgment of the court thereon is reported in 10 Sawy. 415.

On March 16, 1885, the suit was dismissed as to Ben Holladay on his plea in abatement, to the effect that he "is a citizen of the city of Washington, in the District of Columbia." The plea was considered as the equivalent of an allegation that the defendant is not a citizen of any state in the Union, and therefore not suable here on the ground of his citizenship.

Briefly, the case stated in the bill and admitted by the answers or made by the proof, is this: On September 12, 1868, Elliott entered into a partnership with Ben Holladay and C. Temple Emmet, for the purpose of constructing and operating railways in Oregon, which partnership was engaged in the construction of the road of the Oregon Central railway company until November 5, 1869, when Holladay and Emmet commenced a suit in the circuit court for the county of Multnomah, to dissolve said partnership, which suit was afterwards transferred to Marion county, where, on September 28, 1877, a decree was made dissolving said partnership and declaring Elliott indebted thereto in the sum of four hundred and seventy dollars, from which decree Elliott took an appeal to the supreme court of the state, wherein, on August 15, 1879, a decree was given dissolving said partnership, and that Elliott recover from Holladay twenty-one thousand nine hundred and nineteen dollars and forty-six cents, and from Emmet eight thousand five hundred and ninety-six dollars and eight cents, together with nine-tenths of the costs in both the appellate and lower

1886.]

Opinion of the Court—Dady, J.

court, amounting, as taxed, to two thousand seven hundred and ten dollars and seventy-six cents; and there is now due on said decree from said Holladay, principal and costs, the sum of twenty-four thousand six hundred and thirty dollars and twenty-two cents, with interest from August 15, 1879, to January 25, 1881, at the rate of ten per centum per annum, and thereafter at the rate of eight per centum until date—in all, the sum of thirty-eight thousand eight hundred and six dollars and twenty-nine cents.

On February 10, 1874, Elliott being without means or credit, applied to Martin White, then and now a citizen of California, for a loan of twelve thousand dollars to enable him to assert and maintain his rights in said suit, and offered to secure the payment of the same by an assignment of all his right, title and interest in the property involved therein, to the plaintiff in trust for said White. Thereupon, a contract was duly made and signed by said Elliott and White, which in effect recites that a controversy exists between Elliott and Holladay and others, concerning Elliott's "right" in the property, franchise and rights of the Oregon Central railroad company, and that "for the purpose of asserting and maintaining his rights in said controversy, said Elliott has borrowed from Martin White the sum of twelve thousand dollars in gold coin of the United States, and has agreed to repay the same within one year from the date of the last installment thereof, as hereinafter provided (and within two years from the date hereof, whether the last installment shall be demanded by said Elliott within one year from the date hereof or not) with interest on each installment from the date of the advance thereof at the rate of ten per centum per annum."

The agreement continues, that in consideration of the premises, "Elliott has granted to White the option" to be exercised within sixty days after Elliott shall obtain possession of said property, "and notified White thereof" to take in lieu of the repayment of said loan one-half of all the property recovered by said Elliott, less one million of the bonds of the Oregon Central company reserved for the use of the latter, and not exceeding one hundred thousand dol-

Opinion of the Court—Deady, J.

[June,

lars of the same for his attorney. "And to secure the performance of this agreement on his part, and to secure the payment of any additional advances not exceeding thirteen thousand dollars, that he may obtain from said White or other parties, said Elliott has assigned and conveyed in trust to George C. Hickox all his right and title, interest and claim in and to the property aforesaid."

"And in consideration of the agreement and acts of said Elliott, said White has agreed to loan to said Elliott said sum of twelve thousand dollars in gold coin of the United States, and to advance the same upon his demand in installments from time to time, as the same shall be required, upon the terms aforesaid." (See *Hickox v. Elliott*, 10 Sawy. 417, where this agreement is set out in full).

In pursuance of this agreement, Elliott, on February 13, 1874, executed and delivered to the plaintiff the following sale and assignment:

"In consideration of the sum of twelve thousand dollars in gold coin of the United States, to me paid and other valuable considerations, I, S. G. Elliott, of the commonwealth of Massachusetts, have granted, bargained, sold and assigned, and by these presents do grant, bargain, sell and assign unto George C. Hickox, of the city and county of San Francisco, state of California, all my right, title, interest and claim, both in law and equity, in and upon the stock, property and assets of the Oregon Central Railroad company, of Salem, Or., and the Oregon & California Railroad company, of Portland, Or., the firm of A. J. Cook & Co., and the firm of Ben Holladay & Co.

White claims and testifies that between the date of said agreement and March 25, 1879, he advanced to Elliott thereunder, or to others for him, the sum of twenty-two thousand two hundred and one dollars and fifteen cents. It is not questioned but that he advanced this sum, as stated in the account thereof attached to his deposition herein.

But Elliott contends that White failed to advance him money as the agreement required, whereby the arrangement fell through and the assignment became inoperative; and that all sums paid out by White, as set forth in his account,

1886.]

Opinion of the Court—Deady, J.

after July 24, 1874, were so paid without his authority or consent, for which he is not liable.

This contention is based on the assumption that White undertook to advance Elliott not exceeding twenty-five thousand dollars, when and as he might require or demand it. But the truth is, White never undertook anything of the kind.

Taking this agreement and assignment together, and reading them by the light of the surrounding circumstances, it is evident that White did not undertake absolutely to advance Elliott more than twelve thousand dollars, and only so much of that amount as might be necessary, from time to time, to enable the latter to properly carry on the controversy with his partners, which was expected to be brought to an end within the coming year, and that any additional advance that Elliott might obtain from White or other persons, not exceeding thirteen thousand dollars, should be equally secured by this assignment, but White did not undertake to furnish any portion of said additional advance.

Elliott admits that prior to July 2, 1874, and scarcely five months from the date of the contract, White had advanced him eight thousand five hundred and ninety-two dollars and fifty cents, the larger portion of which appears to have been applied to the former's private use, and not to the expense of the litigation with Holladay & Co.

But the evidence shows that by July 14, 1874, there was advanced to Elliott by White eleven thousand seven hundred and eighteen dollars and fifty cents, and that on August 18 thereafter the latter paid Domnett a note of three hundred and sixty-three dollars, which he had accepted for the former, in the February preceding, making the sum, thus advanced, of twelve thousand and eighty-two dollars and twenty-five cents, or eighty-two dollars and twenty-five cents in excess of the sum stipulated.

On April 29, 1874, when over seven thousand dollars had been advanced to Elliott, he drew on White from Portland in favor of himself for five hundred dollars and the defendant Effinger, who was his attorney, for fifteen hundred dollars. On May 6, these drafts were protested

Opinion of the Court—Deady, J.

[June,

for nonpayment, and three days afterward White wrote Elliott, rebuking him sharply for drawing on him for such sums at all, after he had been advised not to draw on him for a dollar.

The letter was put in evidence by Elliott. In the course of it White says if you need some small amounts "for incidental uses in the suit," write and let me know, and I will send my check therefor. "I have already let you have enough to meet all coming (current) expenses, had it been applied to that purpose—in fact I have advanced it twice as fast as I expected to, when I began." I would be glad to furnish the fifteen hundred dollars for Mr. Effinger. "I have no doubt he needs the money, but under the circumstances I cannot see any way to let him have it at present."

With this letter White sent Elliott his check for two hundred and fifty dollars "to defray incidental expenses."

On July 24, 1874, Elliott being in San Francisco, and in need as usual, drew on White in favor of Johnson & Co. for the sums of three hundred and twenty-five dollars and fifteen hundred and seventy-five dollars, and the defendant Effinger for the sum of six hundred dollars, which sums White declined to pay, as he told Elliott he would before the drafts were drawn.

Thereafter, Elliott testifies that he considered the arrangement with White at an end, and the assignment inoperative.

The only item in White's account of the twelve thousand dollars advanced to Elliott, now disputed by the latter, is the two thousand four hundred and sixty-five dollars paid by the former to discharge a debt of Elliott's of that amount secured by a mortgage on the property assigned to the plaintiff, as a security for White, and called the Mackey-Toomy mortgage.

It is reasonable to suppose that when White agreed to advance twelve thousand dollars on the security of this assignment, that for his own protection he would require or provide that a prior mortgage thereon for not less than two thousand dollars should be taken up or satisfied out of that sum. And the evidence is very satisfactory that such was the distinct understanding of the parties to this arrangement.

1886]

Opinion of the Court—Dady, J.

On July 1, the defendants, Elliott and Effinger, were in San Francisco, the latter having in his possession this mortgage for Mr. Toomy, who was anxious to realize on it. White having knowledge of these facts and being about to go to Nevada, to be absent some time, on the next day deposited with Mr. R. P. Clement, the attorney for Elliott, three thousand four hundred dollars, that being the remainder of the twelve thousand dollars yet unadvanced, and informed Elliott of the fact and told him to take Effinger to Clement the next day and have the mortgage paid and receive the balance of the money. But Elliott tried to affect an arrangement by which the mortgage could be satisfied and the debt otherwise secured so that he could draw the full amount deposited with Clement. And being unable to do this, he drew from Clement on July 3, six hundred and fifty dollars, and the 13th and 14th, two hundred dollars, leaving only two thousand five hundred and fifty dollars for the payment of the mortgage, whereon two thousand six hundred and forty-five dollars was then due, which sum White, on August 31, thereafter paid to Effinger on Elliott's account.

From this it appears that although White had not advanced the full sum of twelve thousand dollars on April 29, 1874, still Elliott had no right under the contract to draw on him for such sums as he did, or at all, because he had already received a much larger sum under the contract than he had any right to expect or demand, within the time which had elapsed since it was made.

But really this is not an open question between these parties. From defendant Elliott's exhibit 18, it appears that on Sept. 25, 1874, White commenced a suit in the twelfth district court of San Francisco to enjoin him from disposing of the property covered by the assignment to the plaintiff, in which he set out the agreement and assignment of Feb. 10 and 13, 1874, and alleged that the advances then made thereunder amounted to thirteen thousand three hundred and thirty-seven dollars and twenty-five cents.

In an answer and cross-complaint, filed November 4, 1874, Elliott admitted the execution and existence of the agreement and assignment, but denied that White had advanced

Opinion of the Court—Deady, J.

[June,

thereunder thirteen thousand three hundred and thirty-seven dollars and twenty-five cents, but only eight thousand five hundred and ninety-two dollars and fifty cents, and alleges that he agreed to loan him twenty-five thousand dollars, "as he might wish to use or draw the same," and claimed one hundred thousand dollars damages for the alleged failure to do so, and prayed that the agreement and assignment might be declared null and void; and on April 9, 1875, the court found that prior to the commencement of that action White had "lent and advanced" Elliott twelve thousand dollars, "as the same was required for the purpose mentioned in said agreement;" that White "never agreed to lend Elliott twenty-five thousand dollars or any other or greater sum than twelve thousand dollars, and that Elliott was not entitled to recover any damage in that action or have either said agreement or assignment 'annulled;'" on which finding there was a judgment duly given by said court on July 13, 1875, which still remains in full force and effect.

By this finding and judgment the parties thereto are bound. The fact that White advanced Elliott twelve thousand dollars under the agreement before September 25, 1874, that he never agreed to furnish him any more, and that the agreement and assignment were valid and binding instruments, is *res judicata* and no longer open to question. (*Davis v. Brown*, 94 U. S. 428; *Cromwell v. County of Sac.*, Id. 353; *Russell v. Place*, Id. 608; *Beloit v. Morgan*, 7 Wall. 619; *Outram v. Morewood*, 3 East, 346; *Sharon v. Hill*, 9 W. C. Rep. 9; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 10 W. C. Rep. 285.)

The payments and advances made by White in and about the litigation with Holladay & Co. in excess of the sum of twelve thousand dollars are not necessarily secured by this assignment. Whatever Elliott obtained from him for that purpose is so secured. The advance or payment must have been made with the consent, express or implied, of Elliott. And the nature and necessity of the advance has much to do with the question of an implied consent.

It is true White had a direct interest in the subject of the

1886.]

Opinion of the Court—Deady, J.

litigation which may have justified him in incurring expense in protecting the same, and would have authorized him, under the circumstances, to apply to the court to be allowed to intervene and conduct the cause, as the real or principal party in interest. But even then his advances or expenses would not necessarily be secured by this assignment. There must have been an express or implied assent to the expenditure by Elliott.

On this view of the matter I think the following items in White's account ought to be included in the sum for which the assignment is a security: September 16 and October 31, 1874, payments to Mr. Effinger, the leading counsel in the litigation with Holladay & Co. five hundred dollars and fifteen hundred dollars. Elliott had already drawn on White for these sums and one hundred dollars more, for this very purpose, and although the latter did not then advance the money, he paid it to Effinger soon after, with Elliott's knowledge and apparent approbation. At least, no objection was made to the payment at the time. It was a matter of vital importance to the maintenance of Elliott's rights in the matters then in controversy; and in the absence of any act or word to the contrary, his assent to an act so well calculated to benefit himself ought to be presumed.

September 3 and October 1 and 12, 1875, payments to Moreland, referee, twenty dollars, twenty dollars and six hundred dollars, the amount due from Elliott for fees and charges. These payments were absolutely necessary to get the report of the referee before the court. No objection appears to have been made at the time and Elliott's assent may be presumed.

September 20 and November 25, 1879, payments for printing briefs in San Francisco, and expressage to Portland two hundred and thirty-four dollars and sixty cents, and twenty-three dollars. This brief was prepared and printed in San Francisco, under the direction of Elliott, and the charges paid by White were for his benefit and with his implied assent.

Altogether, these items make the sum of fourteen thousand nine hundred and seventy-nine dollars and eighty-five

Opinion of the Court—Deady, J.

[June,

cents, for which this assignment is a security, and for the amount of which, with interest, the plaintiff is the assignee of the judgment against Ben Holladay, in trust for White, and entitled to maintain this suit for its enforcement. (*Hickox v. Elliott*, 10 Sawy. 422.)

Averaging the periods during which these four sums were advanced, and adding interest thereon from that time to this, at the rate of ten per centum per annum, gives the whole amount for which the assignment is security as follows:

Interest on twelve thousand and eighty-two dollars and twenty-five cents from April 15, 1879—fourteen thousand six hundred and ninety-nine dollars and eighty-five cents; interest on two thousand dollars from October 1, 1874—two thousand four hundred and twenty-two dollars and twenty-two cents; interest on six hundred and forty dollars from September 15, 1875—seven hundred and seventy-eight dollars and sixty cents; interest on two hundred and fifty-seven dollars and sixty cents from March 15, 1879—three hundred and twenty-three dollars and fifty-one cents; total principal, fourteen thousand nine hundred and seventy-nine dollars and eighty-five cents; total interest, eighteen thousand two hundred and twenty-four dollars and seventeen cents; whole amount of claim, thirty-three thousand two hundred and four dollars and two cents.

Of the remaining seven thousand two hundred and twenty-one dollars and thirty cents of the gross amount—twenty-two thousand two hundred and one dollars and fifteen cents—advanced and paid by White in and about this litigation, nearly five thousand dollars went to L. L. Bullock.

Mr. Bullock was in the employ of Elliott, in the litigation with Holladay & Co., as what may be called an outside man, when White made the arrangement with Elliott to advance him money. Thereafter he was paid a monthly stipend much of the time down to the spring of 1879. I think the payments made to him after July, 1874, and particularly after the suit commenced by White against Elliott, in September of that year, may be safely regarded as having been made for services rendered White, if any one, although they may have been of benefit to Elliott as well. At least, there

1886.]

Opinion of the Court—Dedy, J.

is nothing in the nature of the services of the necessity for them, so far as appears, which justifies the conclusion that Elliott assented to the payments being made on his account.

On the hearing of the demurrer to this bill it was claimed for the defendant Elliott, that the suit was barred by the lapse of time and that the contract on which the money was advanced was void for champerty. The same defenses are now set up in his answer and insisted on in the argument.

But I see no reason to question the soundness of the conclusion then reached on these points. As was then said—“It is immaterial whether an action could now be maintained by White against Elliott to recover this money or not. This is not such an action, but a suit brought by a person claiming to be the assignee of a decree, to subject the property of the debtor therein to its payment and satisfaction. And it can be maintained, although the right of action against Elliott to recover the money in question is barred by lapse of time. The statute bars the remedy against Elliott in six years, but does not destroy the debt, and it still exists for the purpose of enforcing any lien or pledge given to secure its payment. (*Quantock v. England*, 5 Burr. 2628; *Sparks v. Pico*, 1 McAllister, 497; *Myer v. Beal*, 5 Or. 130; *Goodwin v. Morris*, 9 Id. 322; 2 Pars. on Con. 379; *Rapelje & L. Law Dic. Limitations.*)”

This contract is claimed to be champertous and therefore void mainly on the option clause therein, whereby White was given the choice, within sixty days after Elliott had recovered possession of the railway property in question, and some millions of bonds of the company, and notified White thereof, of taking in lieu of his money with interest, one-half thereof, less one million one hundred thousand dollars, of the bonds reserved for the private use of Elliott and his attorney. This clause was put into the contract at the suggestion of Elliott, to give the transaction and the subject thereof an air of importance and vastness to which it was not entitled.

As was determined by the supreme court of the state in its judgment in *Holladay & Emmet v. Elliott*, these bonds were issued by a corporation—The Oregon Central—that

Opinion of the Court—Deady, J.

[June,

was a sham and a fraud from its inception, and were utterly worthless. But Elliott did not recover any railway property or bonds in the suit, and of course did not give notice to White to exercise his option. The contingency never happened on which this clause in the contract was to take effect. Nothing was ever claimed or done under it, and practically it is no part of the agreement.

And even admitting that the validity of the contract for the loan and repayment of the money is to be tried by the law of this state, I do not believe that the courts thereof will ever hold a contract champertous or void for maintenance, whereby a party not an attorney in the case or at all, lends a man in straitened circumstances, money to enable him to maintain his rights in the courts, against powerful and wealthy adversaries, on the promise to repay the same with legal interest, secured by a mortgage on his interest in the subject of the litigation. If so, one man could not safely loan another money to defend an action brought to dispossess him of his farm or homestead.

In the brief of counsel for Elliott, it is stated that the supreme court of the state, since the decision in this case on the demurrer to the bill, has held in the unreported case of——v. *Sears*, “that champerty does exist in all its force in this state.” It is also understood that the case is still pending on a rehearing. But I cannot, in a matter of this importance, act on any such informal and indefinite information concerning the judgment of that court. If not published in authentic form, a certified copy of the opinion would have been obtained from the clerk.

However, I am still satisfied with the conclusion reached on the demurrer to the bill.

It was then said (10 Sawy. 430): “This contract was made in California, and in contemplation of law was to be fulfilled or performed there.” It is not only the *lex loci contractus*, but also the *lex loci solutionis*. “It has been held in that state since 1863 that there is no law there against any form of maintenance. (*Mathewson v. Fitch*, 22 Cal. 93; *Hoffman v. Vallejo*, 45 Id. 566). And the contract being valid there is valid here. (Story’s Con. L., secs. 242 (1), 279, 280.)”

1886.]

Opinion of the Court—Deady, J.

And on the point, now urged again, that security was taken for the performance of the contract on property in Oregon, which makes it a contract to be performed here, and therefore its validity is to be tested by the laws of this state, it was said: "The authorities are uniformly otherwise." (Story's Con. L., sec. 287; *De Wolf v. Johnson*, 10 Whea. 443). In the latter case Mr. Justice Johnson, speaking for the court, says: "Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled when the security is taken. The legal fulfillment of a contract of loan, on the part of the borrower, is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract."

In support of his argument, counsel for Elliott now cites Whar. Con. L., secs. 402, 509, 510, 511, and *Parsons v. Trask*, 7 Gray, 473.

The first citation from Wharton is only to the effect that the mode of payment is determined by the law of the place of payment, and that the latter is inferred from the facts. In the other three sections the question is discussed as to what determines the validity of a contract to pay interest, in which the learned writer truly says: "This question has been frequently litigated in the United States, and with results which on their face are irreconcilable."

But neither of them bear on the question, whether the validity of this contract, as to champerty is to be determined by the law of California or Oregon.

But at section 403, Wharton, after stating that so far as performance is concerned, where the law of the place of solemnization of a contract conflicts with that of the place of performance, the latter controls; and that the validity of a mortgage depends on the law of the place where the thing exists, because there alone payment can be enforced, says at note 4—"But this otherwise when a foreign mortgage is taken as collateral security merely, in which case, the place of performance is the place of the payment of the principal bond"—citing the case of *De Wolf v. Johnson*, *supra*.

Opinion of the Court—Deady, J.

[June,

In *Parsons v. Thask*, it was merely decided that a contract made in a foreign country by which an adult person bound herself to serve a citizen of the United States for five years, for ten dollars and board, lodging and clothes, without specifying the nature or extent of the service or the place of performance, even if valid where made, gave no right to the service in Massachusetts, because contrary to the laws and policy of that commonwealth.

But the question here is, where was this contract—this agreement to loan and repay this money—to be performed? If it was to be performed here, then the law of this state as to champerty may apply, otherwise not. The contract was executed in California and the money loaned there; and the only reasonable inference from the facts is that the repayment was to be made there also. Both parties lived in that state. There was nothing in the agreement to the contrary, nor anything in the situation or circumstances of the parties, present or prospective, that pointed in any other direction.

Nor does the fact that collateral security was taken for such repayment on property in Oregon change its character in this respect. On the contrary, such security, as a mere incident of the debt, is so far valid or not according to the law of the place where the loan was made and to be repaid.

Another point is now first made by counsel for Elliott, on section 161 of the penal code of California, which makes it a misdemeanor for an attorney to directly or indirectly buy any evidence of debt or thing in action with intent to bring suit thereon.

It may be admitted that a contract of sale or assignment, the making of which involves the commission of a misdemeanor, is impliedly prohibited and void.

The agreement by which the money was loaned and repayment promised does not come within this section. The transaction so far was not a purchase of anything, but a loan. Nor does the section effect the sale or assignment to Hickox, because whatever passed by the same was obtained not with intent to bring suit thereon—to stir up strife—but to defend one already pending. Nor were Hickox or White attorneys at the time of the transaction. The former never

1886.]

Opinion of the Court—Deady, J.

was an attorney. White was admitted to the bar in California in 1859, and in 1864 quit the practice on account of his health, and has been engaged in mines and mining ever since. Admitting then that White indirectly acquired whatever Hickox took in trust for him, by the assignment, I do not think, on the facts, he was an attorney within the meaning of the statute.

From the evidence it appears that the defendant Effinger was retained by Elliott in the case of *Holladay & Emmet v. Elliott* in the fall of 1872. Thereafter, on December 1st, Elliott agreed to pay him four hundred dollars a month to act as his attorney until the termination of the controversy. By November 4, 1874, he had received from Elliott one thousand four hundred and fifty dollars, and from White on the latter's account two thousand dollars—in all three thousand four hundred and fifty dollars. The suit dragged along for reasons not always within the control of Elliott and still less of his attorney, and was not finally decided until 1879, when Effinger filed a notice of lien on the judgment in pursuance of the statute (code of C. P., sec. 1012, sub. 4), for the sum of thirty-one thousand eight hundred dollars, the amount of his compensation reckoned at four hundred dollars per month from December 1, 1872, to the date of the decree, less the sum of three thousand four hundred and fifty dollars received thereon, as above stated.

I don't think, under the circumstances, that this contract ought to be considered in force after 1874. Shortly before White advanced him the two thousand dollars, Mr. Effinger, seeing the difficulties and delays in which Elliott was involved, wrote the former, offering to take three thousand dollars in addition to what he had already received, in full of his services to date, and such other and further compensation at the end of the litigation, as might be considered reasonable under the circumstances. On this suggestion, White seems to have advanced the two thousand dollars, which Effinger tacitly accepted, and thereafter looked to what might be obtained in the suit as the measure and means of any further compensation.

Certainly it was never in the contemplation of the parties

Opinion of the Court—Deady, J.

[June,

that this large compensation was running on from month to month and year to year, while the suit was much of the time at a stand still.

Effinger testifies that when judgment was obtained in the supreme court he purposed to apportion it between White, Elliott and himself; but the latter immediately repudiated his claim and White's also, whereupon, as a protection for both himself and White, he fell back on his contract and filed the notice of lien accordingly. And the controversy between these two is now apparently a friendly one, and may be adjusted by them irrespective of the action of this court.

An unconditional fee of five thousand dollars, promptly paid or secured, would in my judgment be a reasonable compensation for Mr. Effinger's services. But if the compensation was wholly contingent on success—dependent on making the money out of the litigation—ten thousand dollars would not be an unreasonable fee. After 1874 Effinger's compensation was practically contingent, not only on getting a decree but in realizing on it. This delay and risk must be considered in fixing the amount of this contingent compensation.

In addition to the three thousand four hundred and fifty dollars he received prior to 1875 I will allow him the sum of five thousand dollars, with legal interest from August 15, 1879—the date of the judgment, which amounts to seven thousand eight hundred and seventy-one dollars and eighty-five cents.

The defendant, Joseph Holladay, states in his answer that he has “no knowledge, information, remembrance or belief,” as to the alleged contract and assignment, or the payment of any money thereunder by White, “wherefore he denies” the same. On the hearing he claimed the benefit of this denial as being evidence against the existence of such writings and the making of such payments.

This allegation is a motley of code and equity pleading, but not proper under either. The code does allow a defendant to controvert an allegation in the complaint by denying “any knowledge or information thereof sufficient to form a belief,” but not on that account to deny the allegation itself.

1886.]

Opinion of the Court—Deady, J.

In equity a defendant who has no knowledge, information or belief concerning the matter of an allegation should say so; and this is sufficient to put the plaintiff on the proof thereof. But such an answer is not evidence that requires at least one witness and corroborating circumstances to overcome. It is a mere negation and proves nothing; and the addition, "wherefore he denies the same," amounts to nothing, except to stultify the defendant; for how can a party truthfully deny an allegation of which he has just affirmed he has not even a belief. (*Clark v. Van Riemsdyk*, 9 Cranch. 160; *Brooks v. Bryan*, 1 Story, 301; *Dutilh v. Coursault*, 5 Cr., C. C. 351).

At the close of the argument, counsel for Holladay also filed a motion to suppress the copies of the agreement and assignment, marked in the margin, respectively, exhibit "A" and "B," "George T. Knox, notary public," and attached to the commission on which the depositions of the plaintiff and Martin White were taken.

Both witnesses were asked about the contract and assignment. White, who was examined first, after answering that he had not the originals in his possession, added: "But I hereunto attach a certified copy" of said agreement and assignment, marked exhibit A and B.

Hickox testified that the original contract and assignment were in his possession, and spoke as if he had them there in the presence of the commissioner, and added: "Under advice I prefer to retain" them, "but a certified copy is attached hereto;" and in the case of the assignment he gave the place, book and page of its record in Oregon.

There is but one exhibit A and B attached to the commission, and that is doubtless the one to which both witnesses refer, and which was probably furnished by Hickox.

They are true copies of the agreement and assignment mentioned in the bill and set out in the pleadings in the case of *White v. Elliott*, and are doubtless what they purport to be—true copies of the original writings in the possession of Hickox. Attached to each exhibit is the certificate of Edward Chatten, a notary public and commissioner for Oregon, to the effect that he had compared it

Opinion of the Court—Deady, J.

[June,

with the original in the possession of Hickox, and that it was a true copy thereof.

Had the officer who took these depositions done so in due form of law, it would appear therefrom that the witness produced the original writings before him and identified them, but not desiring to give up the possession, he allowed the commissioner to take copies of them, which the latter attached to the commission with his certificate that they were true copies of the original writings produced by the witness and referred to in his testimony. (*Dundee, etc., Co. v. Cooper*, 10 W. C. Rep. 7).

Discarding the certificate of Chatten, who was a mere volunteer and without authority in the premises, it does appear, at least inferentially, that the witness Hickox, in whose custody the original writings then were, produced them before the commissioner and furnished him with what he testified were true copies of the same, and that the commissioner, either on the strength of that statement or his own examination, and it may be on both, endorsed said copies as the exhibits A and B referred to in the testimony of White and Hickox, and attached them as such to the commission with the depositions.

That all this is technically insufficient for lack of an express certificate by the commissioner that he had compared the alleged copies with the originals and found them correct, may be admitted.

But the objection is one that cannot be made at the hearing.

It should have been made by a motion to suppress before the cause was set for hearing, when, if allowed, the mistake might have been corrected by retaking the depositions. When a cause is set for hearing all technical objections to the reading of the testimony on file are waived. (*York Company v. Central Ry.* 3 Wall. 113; *Blackburn v. Crawfords*, Id. 191. See rules 27 and 28 of this court.)

The answer of Holladay also contains an allegation in bar of this suit to the effect that on November 7, 1883, and prior to the commencement thereof, the circuit court of the state for the county of Multnomah, in a suit then pending

1886.]

Opinion of the Court—Deady, J.

therein between Ben Holladay and Joseph Holladay, appointed a receiver of all the property mentioned in the bill herein, who is now in possession of the same as such receiver, which suit is still pending in said court.

In support of this defense counsel submit the proposition that while property is in the hands of a receiver appointed by a court, no other court can acquire or take jurisdiction of a suit concerning such property, and cites a number of authorities in support thereof. But the proposition is altogether too broad, and is unsupported by the authorities cited.

The receiver has no right in the property, but only the possession thereof. So long as that is not disturbed or questioned parties may litigate in the same court or elsewhere questions concerning the ultimate right and title to the property. And therefore, notwithstanding the suit of *Holladay v. Holladay*, and the possession of the receiver therein, this court may take jurisdiction of a suit to set aside or postpone an alleged fraudulent conveyance of any of this property by Ben Holladay, which hinders or delays the plaintiff in the enforcement of his judgment against said Holladay.

In *Beck v. Colbath*, 3 Wall. 334, this question is examined by Mr. Justice Miller, and the conclusion reached that the rule among courts of concurrent jurisdiction, that the one which first obtains jurisdiction of a case has the exclusive right to decide every question arising therein, is subject to limitations. (See also *Andrews v. Smith*, 19 Blatch. 100.)

The object of the suit in the state court, between the two Holladays, is not stated in the answer. But in the nature of things it cannot involve the matters in controversy here, and particularly the question of whether the plaintiff is entitled, as a creditor of Ben Holladay to have these conveyances to Joseph Holladay set aside or postponed in favor of the judgment against the former.

If this court should find that these conveyances were made with intent to hinder and delay the plaintiff in the collection of his demand under such circumstance as makes

Opinion of the Court—Deady, J.

[June,

the grantee therein a participant in the fraud, it would be its duty to decree that they be set aside or postponed in favor of the plaintiff's judgment. So far, there would be no interference with the process of the state court or the possession of its receiver. Whether this court will stop there and remit the plaintiff to his execution out of the same state court on his judgment therein, or provide for the sale of so much of the property by a master, as may be sufficient to satisfy the same, together with the costs incurred in this court will depend on circumstances.

The latter course cannot be pursued while the receiver is in charge, for that would necessarily interfere with his possession.

But so long as the plaintiff's right to enforce the judgment, and for the amount found due him, depends on a decree of this court, it is proper and very convenient that any disposition of the property in question, to satisfy the same, should be made on its process. And provision may be made in the decree that the sale shall be delayed until the receiver is discharged or that the plaintiff may apply on the footing of the decree for an order of sale as soon as such discharge takes place.

The defendant, Joseph Holladay, also makes the further points against the plaintiff's right to relief: (1) The bill does not allege and it is not shown that there was any debt due from Ben Holladay to the plaintiff or his assignor prior to the date of the conveyances sought to be set aside or any of them; (2) It does not appear that any execution has ever been issued on the decree against Holladay; and (3) There is no evidence that Holladay is insolvent and unable to satisfy the decree, except from the property in question.

The bill alleges that on November 5, 1869, and long prior to the date of any of the conveyances to Joseph Holladay, that a suit was commenced by Ben Holladay against Elliott to dissolve the partnership of Holladay & Co., and for the settlement of its accounts in which a final judgment was given in the supreme court dissolving said partnership as of the date of the commencement thereof, and that Elliott recover from said Holladay, the sum of twenty-one thousand nine

1886.]

Opinion of the Court—Deady, J.

hundred and nineteen dollars and forty-six cents and costs; and the answer of the defendant Holladay admits the allegation, word for word. The allegation might have been more specific, and stated that the sum recovered represented the indebtedness of Ben Holladay to his co-partner Elliott at the commencement of the suit. But such is the necessary implication of the allegation as it stands. The indebtedness must have existed on November 5, 1869, from which time the court determined the partnership was dissolved and the liability of its members to one another ascertained. And the proof to that effect is full and specific. By the decree of the supreme court it is found that the amount for which it is given was a debt, with the interest thereon, due Elliott from Holladay before the commencement of the suit.

Admitting that a mere judgment for money is not evidence of an earlier indebtedness (Bump F. C. 557), still it may appear from the findings of the court or other proceedings in the case anterior to the judgment, how long the indebtedness existed prior thereto.

In *Hinde v. Longworth*, 11 Whea. 211, which was a controversy between a party claiming under a voluntary deed of March, 1799, and one claiming under a money judgment of August the same year against the grantor therein, the court held that while the mere judgment did not show that the plaintiff therein was a creditor prior to the execution of the deed, without which he could not impugn the same for fraud (*Sexton v. Wheaton*, 8 Whea. 242) that the accounts on which the judgment was founded and which were in the record, did show that the cause of action arose before the execution of the deed. (See also, *Goodnow v. Smith*, 97 Mass. 69.) The alleged fraudulent conveyances are about twenty in number, and appear to have been made from November, 1875, to April, 1879, while both the allegation and the proof are satisfactory that the indebtedness existed at and prior to November 5, 1869.

The issue of an execution and the return of *nulla bona* thereon, is considered sufficient evidence of the insolvency of the judgment debtor and that the judgment creditor is

remediless at law. But it is not the only evidence of that fact, nor in my judgment always the best.

The authorities are in apparent conflict on this question. (Waite F. C. sec 68; Bump F. C. 518-527.) But where the diversity is not the result of local legislation, I think the apparent conflict arises from confounding creditors' bills to subject personal property to the satisfaction of a judgment with an ordinary bill in equity to set aside or postpone a conveyance of real property on which the plaintiff's judgment is, as against his debtor, a lien without an execution. In the latter case the right to maintain the suit is based on the unsatisfied judgment, the fraudulent conveyance, and the insolvency of the debtor; which latter fact may be proved by any competent evidence as well as a return of *nulla bona* on an execution. In *Hodges v. S. H. Mining Co.* 9 Or. 200, it was held in a suit against a stockholder of a corporation on a corporation debt, that the insolvency of the corporation might be shown as any other fact, without an execution or even a judgment against it.

Terry v. Tubman, 92 U. S. 156, was an action against a stockholder of a bank to recover the amount of certain unredeemed bills of the corporation. The court held that the insolvency of the bank might be shown otherwise than by a judgment and an unsatisfied execution.

Case v. Beauregard, 101 U. S. 688, was a creditors' bill against the members of an insolvent firm. The court said that a judgment and a fruitless execution are not the only evidence that a creditor has exhausted his legal remedy. "They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear."

In *McCalmont v. Lawrence*, 1 Blatch. 232, Mr. Justice Nelson held that "chancery has jurisdiction, on a bill filed by a judgment creditor for relief against a conveyance of lands by his debtor, made with intent to defeat the judgment lien, or to hinder or delay satisfaction of the judgment, whether execution has been issued thereon or not." (See Bump F. C. 523.)

The insolvency of Ben Holladay is confessed. The bill

1886.]

Opinion of the Court—Deady, J.

alleges that he has no property in Oregon in his own name, and has not had since the date of said decree, out of which the same could be satisfied by execution or other legal process against him; and that he is insolvent and unable to pay said decree except out of the property in question.

This allegation is expressly admitted in the answer, except that the defendant says he "has neither knowledge, information or remembrance sufficient to state whether or not the said Ben Holladay is insolvent or unable in fact to pay the said decree except out of the property described in the bill of complaint."

This allegation of want of knowledge is not evidence and proves nothing. It is also noticeable that the defendant omits to state, as he should, whether he has any belief on the subject or not. But in his evidence, he says over and over again that Ben Holladay was a ruined man financially when he left Oregon in the fall of 1877; that during his stay in Washington the following four years he allowed him five or six thousand dollars a year out of the profits of the mill property, to keep him from starving.

But the admission in the answer that Ben Holladay had no property in Oregon out of which said decree could be made by legal process, is sufficient. That is all a return of *nulla bona* on an execution would show; and either is sufficient evidence of insolvency for the purpose of this proceeding. It matters not how much property he may have out of this state or beyond the process of its courts.

This disposes of the case except as to the question of fact: Did Ben Holladay make the conveyances and transfers in question with intention to hinder and delay his creditors, and did Joseph Holladay receive them with notice of such design or good reason to believe the same.

It is impossible for any unprejudiced mind to give any other than an affirmative answer to this question.

It is not necessary to go into the evidence in detail.

Suffice it to say, that it appears from the defendant's own testimony, and the admitted facts of the case, that in January, 1873, Ben Holladay being indebted to his brother Joseph, in the sum of one hundred thousand dollars, gave

Opinion of the Court—Deady, J.

[June,

him his note therefor; and on November 1, 1876, gave him another note for one hundred and sixty-three thousand three hundred and forty-five dollars, in payment of the former note and interest thereon at twelve per centum per annum, together with a third note for four thousand five hundred dollars, given sometime before.

These notes have remained in the possession of Joseph Holladay and no credits have been allowed or endorsed on them, although three valuable parcels of this real property, of not less than fifty thousand dollars in value, and ten hundred and fifty shares of the Oregon Transfer company's stock, worth not less than fifty thousand dollars more, were conveyed and transferred to him between the giving of the first and last note.

The real property was lots 1, 7 and 8, in block 47, in Portland, on which the Holladay residence is situated the place called the Seaside House and other considerable tracts of land in Clatsop county; and lots 6, 7 and 8 in block 23, in Couch's addition, together with sundry lettered blocks in said addition that were afterward determined to belong to the O. & C. Railway company.

Afterward, between November 25, 1876, and April, 1879, sundry conveyances and transfers of property belonging to Ben Holladay were made to the defendant, namely: Shares of stock—one thousand one hundred and ninety-five in the Portland street railway company; five thousand three hundred and thirty-one in the Wallamet Real Estate company; six hundred and seventy-five in the Wallamet Steam Mills Lumber and Manufacturing company; furniture and stores at the Holladay residence; furniture, stock and farming implements at the Seaside house; the undivided half of the furniture in the Clarendon hotel; Sam Smith's notes for over eleven thousand dollars, secured by mortgage on lot 2 in block 47; mortgage on the Simpson farm in Polk county—afterward foreclosed and bought in; the undivided half of the south half of block 23 in Couch's addition (April, 1877,) on which was built the Clarendon hotel; blocks 20 and 37 in Wheeler's addition to East Portland; the Cornelius farm in Washington county, and nine thousand nine hundred and

1886]

Opinion of the Court—Deady, J.

ninety-five shares of the stock of the Oregon Real Estate company.

The defendant contends that he did not receive this last stock from Ben Holladay, but that he bought it from the Bank of California for thirty-four thousand dollars, to whom the former had pledged it as collateral security for a loan of probably not less than twenty-five thousand dollars. But the fact is admitted that the payment was made out of moneys derived from the property and business transferred to him by his brother, and mainly out of the earnings of the transfer company.

The plaintiff alleges that this property when conveyed to the defendant was worth two hundred and twenty-five thousand dollars, and was worth at the commencement of this suit five hundred thousand dollars. In his answer the defendant says the property was not worth over one hundred thousand dollars when he received it, and that it is now not worth over four hundred thousand dollars.

My conclusion is that the allegation in the bill on this point is substantially correct.

Nothing passed between the brothers at the time these conveyances were made as to their purpose or object. Joseph never asked for any of them, and Ben never told him why he made them. And the only conversation that ever passed between them on the subject, according to the former's testimony, is that as his brother was about to leave the state in the fall of 1877, he went to his house, when the former said to him without solicitation or explanation: "All this property belongs to you and no power on earth can take it away from you." And he insists that he received it silently but in "good faith" in payment of the debt then due him.

The various properties remained in the hands and under the management of the persons in charge before the transfers were made, and the rents and profits of the mill and hotel, so far as they could be spared from the payment of debts, charges and taxes, were largely transmitted to Ben Holladay at Washington.

The defendant admits that he consented that the manager

Opinion of the Court—Deady, J.

[June,

of the mill, Mr. George Weidler, might send his brother five or six thousand dollars a year to keep him from starving while in Washington prosecuting his Indian spoliation claim; and says that he has since learned that Weidler let him have not less than seventy-five thousand dollars, during this time, without his knowledge.

And the fact appears to be, as this statement tends to show, that Joseph Holladay was a mere figurehead for this property, and knew very little about its management or condition.

Ben Holladay's actual and trusted representative was Weidler, who managed his affairs, using Joseph Holladay's name as ostensible owner whenever necessary.

In the spring of 1879 the defendant was in Washington, and being in need of money, applied to his brother for one thousand dollars, which was refused for want of means. Thereupon he wrote Ben Holladay a letter, which is in evidence.

After stating the request and refusal, he writes in substance: "You have just made fifteen thousand dollars on the sale of O. & C. bonds and yet refuse me one thousand dollars, when you know I have not a dollar on earth, but have let you have every dollar I had on earth fifteen years ago."

When the decree was given in the supreme court in favor of Elliott in 1879, the personal property at the Seaside house and in the Holladay residence was immediately transferred to the defendant by the agent of Ben Holladay to prevent its seizure on execution. When the bills of sale were presented to him, he appeared to apprehend the purpose of the transaction, and said it was no use, the judgment would hold the property; but on being assured by the agent, on the authority of a prominent lawyer, that nothing but an execution would prevent the transfer of personal property, he acquiesced and took the bills.

And lastly, in his answer in *Holladay v. Holladay*, which appears from the evidence to be a suit to have these conveyances, which are absolute in form, declared to be mortgages, the defendant swore that these conveyances were delivered to him "secretly and fraudulently" by Ben Hol-

1886.]

Opinion of the Court—Deady, J.

laday “with the fraudulent intent” on his part “to cover up and conceal from his creditors” said property, and “in the fraudulent hope and expectation” that the defendant “would support him therefrom and would fraudulently join and assist him in purchasing from his creditors their said claims and debts for a small percentage of their face value and force them to compromise the same, and would thereafter reconvey the remainder of the property to him;” and for fear the creditors of Ben. Holladay might have the defendant examined on oath concerning said conveyances “said understanding and expectations were not put in the form of words or in writing,” but Ben Holladay “verbally said to the defendant in November, 1877, and divers other times, that said lands and personal property belonged to and were the property of this defendant.”

This is a full and frank confession of the fraudulent intent of the grantor in these conveyances, and the knowledge and acquiescence, if not the active participation, of the defendant therein.

After a careful consideration of all the facts, in my judgment the best construction that can be put on these transactions is this: The conveyances and transfers were made by Ben Holladay to Joseph Holladay, not in payment or satisfaction of his debt, but to secure it for the time being and until there was a change for the better in his circumstances, which he probably hoped might soon come through the action of congress on his Indian spoliation claim, and in the meantime to thereby prevent and delay his other creditors from collecting their debts, at what he might consider a sacrifice of a large property which in the near future would greatly enhance in value.

However, the law of the case is clear. The conveyances are void as to existing creditors, both as to the grantor and grantee.

Section 51 of chapter 6 (Or. Laws, 523), which is substantially chapter 5 of 13 Elizabeth, provides, among other things, that every conveyance of any estate in lands or goods or things in action, “made with intent to hinder, delay or defraud creditors or other persons of their lawful * * *

Opinion of the Court—Deady, J.

[July,

debts or demands, * * * as against the persons so hindered, delayed or defrauded, shall be void."

It is not necessary that the grantee in a deed made to hinder or delay creditors should have actual knowledge of the debtor's intent to make it void. A knowledge of facts sufficient to excite the suspicions of a prudent man and put him on enquiry, amounts to notice, and is equivalent in contemplation of law to actual knowledge, and makes the grantee a party to the wrong. (*Clements v. Moore*, 6 Wall. 312; *Bartles v. Gibson*, 17 Fed. Rep. 293; Bump F. C. 200.)

And the grantee in such a conveyance cannot avoid the effect of these criminative circumstances by insisting that he acted in good faith. *Res ipsa loquitur*. For good faith in such case cannot co-exist with notice of the wrongful intent of the grantor.

The conveyances of the real property being void as to the plaintiff, he is entitled to have them so declared and set aside, so far as may be necessary to collect thereout the judgment against Ben Holladay—and it is so ordered.

The plaintiff is also entitled to costs against the defendants Elliott and Joseph Holladay, but whether they shall be taxed against them in *solido* or severally, and if the latter for what amounts, and whether the decree shall leave the plaintiff to enforce his decree by execution from the state court or by the process and under the direction of this court, will be determined at the settlement of the decree, on which counsel may be heard.

JULY 23, 1886.

DEADY, J. This is an application by the defendant, Joseph Holladay, to have me fix the amount of the supersedeas bond to be given by him on his appeal from the final decree herein of this court. Notice of the application was given to counsel for the plaintiff, and the matter has been argued before me.

To premise: In the opinion delivered in the case on the 14th ultimo, the court, following the lead and argument of counsel, assumed that the decree of August 15, 1879, in *Holladay v. Elliott*, was a lien on the real property, that the former procured to be conveyed to his brother Joseph with

1886.]

Opinion of the Court—Deady, J.

intent to hinder and delay his creditors, and which it was the object of this suit to reach and subject to the payment of the plaintiff's claim. But on the argument of the motion of the defendant Holladay, for a rehearing, attention was called to the fact that the legal title to the property never was in Ben Holladay—that when he acquired it, for reasons of convenience or otherwise, he had it conveyed to third persons on a trust or understanding, that they would hold and convey the same as he might direct.

Afterwards Ben Holladay, with intent to hinder and delay his creditors, procured the persons thus holding the legal title to the property to convey it with like intent to Joseph Holladay.

The interest of Ben Holladay in the property was therefore only an equity, and was not affected by the lien of the decree against him. (*Smith v. Ingles*, 2 Or. 44.)

Nor would the lien of this decree have reached this property if the legal title thereto had been in Ben Holladay at the time of the conveyance to his brother. The conveyances antedated the decree, and there would have been nothing left of the property in Ben Holladay for it to become a lien on. The lien of a judgment or decree only affects property owned by the debtor at the time of docketing the same. A conveyance in fraud of creditors, although void as to them, is valid between the parties and passes all the estate of the grantor in the premises to the grantee. Practically it is only voidable at the instance of creditors. (*In re Estes*, 6 Sawy. 459.)

Accordingly, the decree in the case was framed to meet this view of the matter which was fully presented by the bill. From the time of purchasing the same Ben Holladay has had the equitable estate in this property, and one object of this suit is to subject this interest as an equitable asset to the payment of the decree obtained against him by Elliott. In such a case the creditor does not acquire a lien by the judgment against his debtor, and he may maintain a bill to subject such asset to the payment of his debt without it.

Section 1000 of the Revised Statutes, provides: "Every justice or judge signing a citation on any writ of error,

Opinion of the Court—Deady, J.

[July,

shall * * * take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ of error or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only, where it is not a supersedeas, as aforesaid."

As an exposition of this section and a guide to judges taking security under it, the supreme court in 1867, adopted rule 29, which provides, that: "Such imdernity, when the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of judgment or decree, including just damages for delay and costs and interest on appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and suits on mortgages * * * indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay and costs and interest on the appeal."

Assuming that the decree of August 15, 1879, is a lien on this property, the defendant contends that the decree in this case is thereby "otherwise secured," within the necessary meaning of this rule, and therefore a supersedeas bond ought not to be required in a greater amount than may be necessary to secure "the costs of the suit and just damages for delay and interest on the appeal."

But this argument, as we have seen, is founded on a misapprehension of the effect and operation of the decree against Ben Holladay.

Counsel also contends that the decree in this case is a lien or charge on this property, and therefore the amount of it is "otherwise secured" and likens it to the case of a decree to enforce the lien of a mortgage mentioned in the rule. But a mortgage is a lien or security for the debt, independent of and anterior to the decree enforcing it, and therefore it may be truly said that the money for which the decree is given, is secured otherwise than by the decree itself. In other words the security is something collateral to or outside of the decree appealed from. But admitting that the money

1886.]

Opinion of the Court—Deady, J.

due the plaintiff, as determined by this decree is now a charge or lien on this property, it is only so by virtue of the same. Money so secured can not be said to be "otherwise secured" than by such decree.

If this decree was for the payment of money generally, it would become a lien or charge on the real property of Joseph Holladay from the date of its being docketed, but no one would contend that such lien or charge is such a security as would authorize the taking of a supersedeas bond on an appeal from the decree, in a sum merely sufficient to cover costs, damages for delay, and interest on appeal.

Now this is a decree against Joseph Holladay for the recovery of money, to be enforced, it is true, not against his property generally, but only so far as he has wrongfully possessed himself of the property of the original debtor. But, like any other money judgment, it can be satisfied by the payment of money.

Counsel for the defendant also contends that by operation of the rule of *lis pendens* the money due the plaintiff on this decree is otherwise secured. Pomeroy (Eq. Jur., sec. 635) says that "the doctrine of notice by *lis pendens* extends to all equitable suits which involve the title to a specific tract of land, or which are brought to establish any equitable estate, interest or right in an identified parcel of land, or to enforce any lien, charge or incumbrance on land."

This suit is not brought to enforce any lien charge or incumbrance, on this property, for none exists, so far as this plaintiff is concerned. Neither does it involve the title to it. The plaintiff never claimed any title to or interest in the land. His only claim is that his debtor has procured this property, of which he was the real owner, to be conveyed to the defendant to prevent the collection of his debt, and the object of his suit is to establish that fact and obtain relief against the wrong by a sale of the property, as on execution, notwithstanding such conveyance.

This suit is brought to establish a right in equity to an execution against the property in question to satisfy a judgment, which owing to the wrongful acts of the debtor therein, cannot now be reached by an execution at law.

In *Jerome v. Carter*, 21 Wall. 17, the supreme court held, in

the language of the syllabus that "the amount of the supersedeas bond as well as the sufficiency of the security are matters to be determined by the judge below, under the provisions of the 29th rule." This ruling was affirmed at the last term, in *Mexican C. C. Co. v. Reusens*, 118 U. S., 49.

And this case sheds light on the question when a money judgment is "otherwise secured" within the meaning of the rule 29.

The case is very briefly reported, but it appears there was an attachment, levied on the property of the defendant which was discharged on giving bond. Judgment was given against the defendant and the case was taken to the supreme court on a writ of error. On signing the citation, the judge took a supersedeas bond in less than the amount of the judgment. There was a motion in the supreme court for additional security which was denied, on the ground that the matter was in the discretion of the judge who took the bond. Chief Justice Waite, in announcing the decision of the court, referring to the bond for the discharge of the attachment, said: "It stands, therefore, as security for the payment of the judgment, and the judge, when he took the supersedeas bond, acted with reference to a judgment which was 'otherwise secured' within the meaning of rule 29, and could be governed accordingly."

My decided impression is that the money due the plaintiff, as ascertained by the decree, is not "otherwise secured" within the meaning of the 29th rule, and that the bond for a supersedeas ought not to be taken in an amount less than sufficient to secure the face of the decree and costs, interest thereon for three years, ten per centum damages for delay, and the costs of the appeal.

These items will amount in round numbers to about fifty-five thousand dollars. To meet contingencies, it is usual to take the security in a greater amount than the sum secured. In this case I think the sum of seventy-five thousand dollars will be sufficient. Not less than two sureties will be required to the bond. The names proposed may be first submitted to counsel for the plaintiff, and if they are satisfactory to him they will be accepted by me of course; otherwise they must be examined before me on oath as to their sufficiency.

1886.]

Points decided.

EX PARTE EMILIUS W. HANSON, PETITION FOR HABEAS CORPUS.

DISTRICT COURT, DISTRICT OF OREGON.

JUNE 24, 1886.

1. LICENSE TO SELL GOODS.—A charge on a license to sell goods is a tax thereon.
2. TAX ON GOODS, WHEN A REGULATION OF COMMERCE.—A tax imposed by one state on the sale of the products of another state within its limits, which in purpose or effect discriminates against said products and in favor of its own, is a regulation of commerce among the states, and therefore void.
3. *IDEM*—WHEN LAWFUL.—A tax or charge imposed equally on the products of the state imposing it and those introduced from other states, is not a regulation of commerce, but only an exercise of the taxing power of the state.
4. DRUMMER ORDINANCE.—An ordinance of the city of Portland requires every person who goes from place to place therein soliciting the purchase of goods, without reference to the place of their product or manufacture, or offering to sell or deliver the same by sample or otherwise, to take out a license and pay therefor twenty-five dollars per quarter, or so much a day for a less time: *Held*, that on its face the ordinance did not discriminate against the products of any state, and therefore it was not a regulation of commerce, but only a tax; and its character in this respect is not affected by the fact that in some or many instances the revenue derived from the tax may be paid largely or wholly by the products of other states, because the same are not produced in Portland, or the producer therein having less need for the services of a drummer, may not employ one.
5. HABEAS CORPUS FOR THE DELIVERANCE OF PERSON HELD UNDER AUTHORITY OF A STATE.—The circuit and district courts of the United States have authority to discharge a person by *habeas corpus* from imprisonment under the authority of a state, contrary to the constitution or a law or treaty of the United States; but when such person is in custody only on the charge of an offense against the laws of the state, the court may in its discretion refuse to discharge him before trial or even afterward, and until the case has been heard in the state court of last resort.
6. POWER TO REGULATE COMMERCE.—*Quære*: Does the power of congress over commerce include commerce between a state of the Union and a territory thereof?

Before DEADY, District Judge.

Mr. H. Todd Bingham and Mr. Edward W. Bingham, for the petitioner.

Mr. Zera Snow and Mr. Albert H. Tanner, contra.

Opinion of the Court—Deady, J.

[June,

DEADY, J. This is a petition by Emilius W. Hanson for a writ of *habeas corpus*. The amended petition states that the petitioner is unlawfully restrained of his liberty by Samuel B. Parrish, the chief of police of the city of Portland; that the petitioner is a resident of Seattle, Washington Territory, and is the salesman of the Northwestern Cracker company of that place, which is there engaged in the manufacture of breadstuffs, and in the sale of the same there and elsewhere; that as the agent of said company, the petitioner on May 20, 1886, at Portland, offered to sell breadstuffs, manufactured thereby, upon an agreement that the same were to be manufactured in Seattle, and shipped thence to the purchasers in Portland, whereupon said Parrish arrested the petitioner because he did not have a license from Portland "as a drummer and commercial traveler" for selling goods as aforesaid, as required by ordinance 4817, entitled "An ordinance to license, tax and regulate drummers and commercial travelers," and approved March 4, 1886; that manufacturers or merchants of Portland are not taxed for the privilege of selling goods at their places of business therein, and do not employ persons to go about from place to place within said town offering to sell goods by sample or otherwise; that said ordinance was designed and intended to discriminate in favor of goods held in Portland for sale against goods held elsewhere and offered for sale therein, and by reason of the tax thereby imposed on the latter, does in fact so discriminate, and is therefore in conflict with the constitution of the United States, which gives congress the power to regulate commerce among the states, and void; and the proceeding thereunder against the petitioner is therefore without due process of law, and contrary to the fourteenth amendment.

Briefly stated, the ordinance in question requires "drummers and commercial travelers" to pay a license of twenty-five dollars per quarter, or three dollars per day for less than six days, or two dollars per day for any greater number of days, and in default thereof, to be punished by a fine of not less than ten dollars, nor more than two hundred dollars, or by imprisonment not less than five nor more than ninety days.

1886.]

Opinion of the Court—Dedy, J.

“A drummer or commercial traveler” is defined by the ordinance as follows:

“All persons who shall go about from place to place within the corporate limits of the city of Portland, soliciting the purchase of goods, wares or merchandise, or offering to sell, barter or deliver any goods, wares or merchandise by sample or otherwise, are hereby defined [declared] to constitute drummers and commercial travelers.”

Notice of the application was required to be given to the city attorney, who appeared and contested the right to the writ.

A tax or charge for a license to sell goods is in effect a tax on the goods themselves. (*Welton v. Missouri*, 91 U. S. 278).

It is now well settled that a tax imposed by a state, directly or indirectly, on the products of another state, when brought within its limits or offered for sale therein, which in effect discriminates against said products and in favor of those of the state imposing the tax, is a regulation in restraint of commerce among the states, and as such, is a usurpation of the power conferred on congress by the constitution of the United States. (*Ward v. Maryland*, 12 Wall. 418; *Welton v. Missouri*, 91 U. S. 275; *Guy v. Baltimore*, 100 U. S. 434; *Walling v. Michigan*, 116 U. S. 446.)

On the other hand, where the tax or charge is imposed equally on the products of the state imposing it and those introduced from other states, the law or ordinance imposing the same is not a regulation of commerce, but only a legitimate exercise of the taxing power of the state. (*Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, id. 148; *In re Rudolph*, 6 Sawy. 295; *ex parte Robinson*, 12 Nev. 263).

On its face this ordinance makes no discrimination between the products of this state and any other state or country. “All persons” who engage in the business of going about from place to place within the city soliciting the purchase of goods without any reference to the place of their production or manufacture are required to take out the license and pay the tax. The agent of the cracker company of Portland and the cracker company of Seattle are each included in the terms of the ordinance, and alike punishable for its violation.

Opinion of the Court—Deady, J.

[June,

But admitting this, counsel for the petitioner insist that this ordinance does in fact discriminate against the Seattle cracker company, because the Portland cracker company, having a place of business in the city, does not have the same need for an agent to go from house to house and take orders for goods, and therefore is not likely to employ one, and may thus escape the payment of the tax.

A court will look behind or beyond the mere words of a statute, however chosen or arranged, to see if in its actual operation it must necessarily result in discrimination. But this ordinance is not obnoxious to the charge of discrimination in its operation, because under the circumstances the Seattle company is more likely to employ a drummer than the Portland one.

Indeed, this very argument seems to have been considered by the supreme court in the analogous case of *Hinson v. Lott, supra*. In that case, a statute of Alabama imposing a tax on dealers in spirituous liquors of fifty cents a gallon on each gallon offered for sale within the state and brought there from without it, was held valid, because the same statute also provided that a tax of fifty cents a gallon should be paid by the Alabama distiller on each gallon of whisky and brandy manufactured in the state from fruit.

The tax on the distiller was considered the equivalent of that imposed on the dealer, so that there was no discrimination against the latter, neither in purpose nor effect. The terms "whisky" and "brandy" were considered the equivalent of "spirituous liquors," and it was assumed that they were not manufactured in Alabama from any article, but "fruit."

Mr. Justice Nelson dissented from the opinion of the court in this and the preceding case of *Woodruff v. Parkham, supra*, and in the course of his opinion sought to maintain that the Alabama statute, however well intended or phrased, did by reason of the peculiar circumstances of the case, operate unequally, and result in a discrimination against the spirituous liquors not produced in the state. By way of illustration he said (8 Wall. 146)—"Alabama is a cotton growing state, and depends upon the Northern states bordering

1886.]

Opinion of the Court—Deady, J.

on the Mississippi and the Ohio for the most of her corn, wheat and flour. She cannot, therefore, be a state largely engaged in the manufacture of whisky. The tax, so far as regards her own people, is probably nearly nominal."

But the doctrine of the case appears to be, that so long as the product or business of the state imposing the tax is made to pay its just proportion of the same, the act providing therefor is not obnoxious to the charge of discrimination, although the gross revenue derived by the state from the tax may be largely collected from the product or business of other states.

As I read the case, the mere accidental circumstance that Alabama consumed more whisky than she produced, and therefore her whisky tax was for the greater part collected from the northern product, did not invalidate the tax, provided the Alabama product, whether much or little, paid at the same rate as the other.

The power of this court to issue the writ of *habeas corpus* when any person is restrained of his liberty in violation of the constitution of the United States is given by congress in unqualified language. (Rev. Stat., secs. 751-755). And any one imprisoned or in custody by authority of a state under a void or unconstitutional act thereof, is restrained of his liberty in violation of the fourteenth amendment, which forbids any state to "deprive any person of life, liberty or property without due process of law." (*In re Lee Tong*, 9 Sawy. 335; *In re Wan Yin*, 10 Sawy. 538).

As was said by Mr. Justice Bradley, in *ex parte Siebold*, 100 U. S. 376: "An unconstitutional law is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but it is illegal and void, and cannot be a legal cause of imprisonment."

In *ex parte Royal*, 117 U. S., 241, this subject has lately been considered by the supreme court. This conclusion is reached: That while the circuit and district courts have full authority to issue the writ of *habeas corpus* in all cases where a party is restrained of his liberty, "in violation of the constitution or a law or treaty of the United States," by the authority of a state, either before or after trial

Opinion of the Court—Deady, J.

[June,

thereby, and “dispose” of him “as law and justice require,” still the court has a discretion in the premises, which should be exercised, so as not to disturb the relations between the courts of the Union and the state “by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution;” and that “where a person is in custody, under process of a state court of original jurisdiction, only for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the constitution of the United States,” the court has discretion whether it will discharge him on *habeas corpus* before trial or even afterward, and before the case is finally heard in the state court of the last resort; subject, however, “to any special circumstances requiring immediate action.”

On the authority of this case, this court might and probably ought, even if it thought the ordinance invalid, to refuse the writ for the present, and leave the party to his trial in the state court. No special circumstance is shown calling for the immediate intervention of this court.

There is also a question whether the clause in the constitution (Art. I, sec. 8) giving congress power “to regulate commerce * * * among the several states,” includes the commerce between a state and *territory* of the United States. The latter is a *state*—a collection of persons occupying a certain territory, with a legislative and executive organization—in the large and general sense of the word. (*In re Bryant*, 1 Deady, 118; *The Ullock*, 9 Sawy. 634; *The Abercorn*, 26 Fed. Rep. 877). But a territory is not a member of the Union formed by the constitution—and “the several states” referred to therein, among whom congress may regulate commerce, are only those embraced in such Union.

Congress has power to regulate commerce in the territories, by virtue of its general power over them. But it has no power over the internal commerce of a state, and its power over the external commerce thereof is apparently qualified by the condition, that it is with a foreign state, a state of the Union or an Indian tribe of the United States,

1886.]

Opinion of the Court—Deady, J.

in which category the territory of Washington is not included.

With this suggestion of the question I leave it.

The writ is denied and the petition dismissed, on the ground of the validity of the ordinance.

SOL KING AND I. R. CAMPBELL v. THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

JULY 3, 1886.

1. PARTIES TO BILL OF REVIEW.—Where the defendants in a decree were not necessary parties to the suit, one or more of them may maintain a bill of review to reverse the same, without making the co-defendants parties thereto.
2. DECREE IN U. S. CIRCUIT COURT—BILL TO REVERSE.—A decree of the U. S. circuit court will not be reversed on a bill of review therein, because in the meantime the state court has put a construction on a clause of the state constitution contrary to that of the circuit court in making said decree.

Before DEADY, District Judge.

Mr. James Watson, for the plaintiffs.

Mr. William H. Effinger, for the defendants.

DEADY, J. This is a bill of review, brought to reverse a decree, given by this court on September 4, 1884, in a suit, wherein the defendant herein, was the plaintiff and the plaintiffs herein, and sundry others, were the defendants.

The original suit was brought to restrain the plaintiffs herein, Sol King, as sheriff of Benton county, and I. R. Campbell, as sheriff of Lane county, and others, from collecting certain taxes theretofore levied by said counties and others respectively, on certain mortgages of real property, held and owned by the plaintiff therein, as security for money loaned to the parties executing the same, under the act of the Legislative Assembly approved October 26, 1882, and commonly called "the mortgage tax law," on the ground that the same was void and of no effect for reasons therein stated.

Opinion of the Court—Deady, J.

[July,

On a demurrer to the bill the court held that the act was unconstitutional and void and overruled the demurrer; and on the failure of the defendants to answer the bill within the time allowed therefor, the court gave a final decree perpetually enjoining the plaintiffs herein and their co-defendants from collecting or attempting to collect said taxes, amounting in the case of Benton county to eight hundred and seventy-three dollars and twenty cents, and in the case of Lane county to eight hundred and eighty-four dollars and seventy-five cents.

The bill alleges that the decree is manifestly erroneous in this: The court erred in overruling the demurrer to the bill and in enjoining the defendants therein, and in requiring them to pay the plaintiff's costs and disbursements.

The mortgage tax law provided that mortgages on land in no more than one county should be assessed and taxed as land. The court held the act unconstitutional for want of uniformity, and because the same is special, or as stated in the syllabus of the case (10 Sawy. 52)—“An act which provides for the taxation of mortgages on land in no more than one county, there being mortgages on land in more than one county, is void for want of the uniformity required by section 1 of article 9 of the constitution of the state; and also because it is contrary to section 23 of article 4 of said constitution, which forbids special legislation on that subject.”

In October 1884, the supreme court of the state in *Crawford v. Linn County*, 11 Or. 482, decided that the mortgage tax law was not unconstitutional for want of uniformity, because a two-county mortgage, though exempt from its operation, was taxed as a solvent debt under the old law in the county where the creditor resided; and that said law, although operating only in particular cases, was not a special one, because under section 27 of article 4 of the constitution which declares: “Every statute shall be considered a public law, unless otherwise declared in the statute itself”—it is a public one and therefore a general one.

The defendant demurs to the bill for the non-joinder of

1886.]

Opinion of the Court—Deady, J.

the co-defendants of the plaintiffs herein, in the original suit and that there is no error in the record cognizable or relievable in this suit.

The objection that all the defendants in the original suit ought to have been made parties plaintiff in this is not well taken. It is questionable whether the plaintiff had a right to join the several parties as defendants in the original bill, as it did. At most they were only proper parties, but not necessary ones. The interest of these several counties and school districts was separate and distinct, and the only thing in common between them was the question of the validity of the law under which they claimed the right to collect the several taxes levied by them. So here the interests of these plaintiffs in the operation of this decree and its reversal is distinct and separate from their co-defendants therein, and they may maintain this suit without making them parties thereto.

And now, under the circumstances, ought this decree to be reversed. There is no error apparent on the face of the record, and the suggestion of error is based wholly on the difference between the judgment of this court in the case and that in *Crawford v. Linn*.

Without stopping to consider which of these decisions is nearest right or most reasonable, and admitting that this court ought to follow the construction given to the constitution of the state by its own courts, in this matter, is it under any obligation to reverse a decision heretofore made by it, simply because it does not conform to a subsequent ruling of the state court.

When this decree was made this court followed the rulings of the state court on all the points in the case, concerning which the oracle had then spoken. But whether the act was passed in violation of section 1 of article 9 of the constitution, which requires the legislative assembly to "provide by law for uniform and equal rate of assessment and taxation" or in violation of section 23 of article 4 thereof, which forbids the passage of "special or local laws," "for the assessment and collection of taxes," had not then been considered by the state court. Under the circumstances, it

was the right and duty of this court to decide these questions for itself, and according to the light then vouchsafed it. If the decree is erroneous compared with the constitution and law of the state as then construed and understood, it ought to be reversed, otherwise not.

While the national courts are bound to *follow* the settled construction given by the local court to the state constitution, I am not aware of any rule of law or consideration of public policy, convenience or comity that requires the former to *go back* and change its judgments or decrees to make them conform to the subsequent rulings of the latter. When this decree was made, it was in strict conformity with the settled construction given to the state constitution by the state court, so far as the latter had gone, and this was all that could have been required. *Rowan v. Runnels*, 5 How. 134.

It may be said that the decision of the state court in *Crawford v. Linn* did not change the law or legal significance of the constitution, but only declared what it was, as well when this decree was given as since. But suppose this court in making this decree had followed a prior decision of the state court, and afterwards the latter had changed front on the question? And that this is a supposable case, is common knowledge, because the like, at least sometimes, happens.

Would this court be bound on a bill of review, to reverse its decree, made in conformity with the constitution of the state, as then expounded by the state tribunal, because the latter had since seen proper to give that instrument a different construction? Certainly not; and if not, why not? Because the decree was, so far as could be known, confessedly right when made, and could not become erroneous by a change in the subsequent rulings of the state court. Substantially, the case under consideration is in a like condition. In the absence of any construction of the state constitution in the particulars in question, it was, as I have said, the right and duty of this court to construe it, *pro re nata*, for itself.

In that ruling, judged by the then existing exposition of that instrument, there is, in my judgment, no error. And

1886.]

Points decided.

the subsequent contrary ruling of the state court, in *Crawford v. Linn*, although a guide to this court in future cases, cannot operate retroactively and make a decree erroneous which was originally valid.

The demurrer is sustained, and the bill dismissed.

SAN FRANCISCO SAVINGS UNION ET ALS. v. IRWIN.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JULY 8, 1886.

1. PUBLIC LANDS—ACT OF CONGRESS OF SEPTEMBER 28, 1850—SWAMP AND OVERFLOWED LANDS.—The act of congress of September 28, 1850, granting to each state then in the Union its swamp and overflowed lands, effected an immediate transfer of interest, which cannot be defeated nor in any way impaired by the delay or refusal of the secretary of the interior to have the required list made and patent issued.
2. SAME—ISSUE OF PATENT—PAROL TESTIMONY.—Wherever the secretary of the interior has made out and certified a list of the swamp and overflowed lands as required by the act of congress of September 28, 1850, which confers them upon the state in which they are situated, and has issued the patent, his determination is so far conclusive as to the character of the land that it cannot be collaterally attacked; but where he has failed to make such list, and to issue the patent, it is competent for the state, or parties claiming from it, to prove by parol testimony that the land is of the character mentioned in the act of 1850.
3. UNITED STATES AND EXECUTIVE DEPARTMENT—NAVY OFFICER—UNJUSTIFIABLE RETENTION OF PROPERTY.—The fact that one is an officer of the navy of the United States, and is acting under their orders, gives no justification for the retention of the premises against the claim of the true owner.
4. WATERS AND WATERCOURSES—ISLANDS—LIMIT TO PRIVATE OWNERSHIP.—Private ownership of the land of Mare island did not, under the grant of the Mexican government, extend to lands regularly covered each month by the flow of the tides.
5. UNITED STATES AND EXECUTIVE DEPARTMENTS—STATUTE OF LIMITATIONS.—Legal proceedings to enforce the claim of a citizen to lands in possession of the United States cannot be taken, and the statute of limitations cannot run against one to whom the courts are thus closed for the maintenance of his claim.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

AT LAW.

Opinion of the Court—Mr. Justice Field.

[July,

Mr. S. O. Houghton and Mr. Geo. A. Nourse, for plaintiff.

Mr. S. G. Hilborn, United States attorney, and Mr. A. L. Rhodes, for defendant.

FIELD, Circuit Justice. This is an action to recover possession of a tract of land situated partly in the county of Napa, and partly in the county of Solano, consisting of seven thousand four hundred and thirteen acres and a fraction of an acre. It is alleged to be swamp and overflowed land, and that the title to it therefore passed to the state by the act of congress of September 28, 1850, "to enable the state of Arkansas and other states to reclaim the swamp lands within their limits." (9 Stat. 519.)

The first section of that act grants to the state of Arkansas "the whole of those swamp and overflowed lands, made unfit thereby for cultivation," which were unsold at the date of its passage. The fourth section extends the provisions of the act to, and confers their benefits upon, each of the other states of the Union in which swamp and overflowed lands are situated.

The act is a grant *in presenti*, to each state then in the Union, of lands situated within its limits of the quality described. Its language is that they "shall be, and the same are hereby, granted to said state," words which import an immediate transfer of interest, and not one in the future.

The provisions of the second section, making it the duty of the secretary of the interior, as soon as practicable after the passage of the act, to make out an accurate list and plat of the lands described, to transmit the same to the governor of the state, and, on his request, to cause a patent to be issued to the state, and declaring that "on that patent the fee-simple to said lands shall vest in the state," subject to the disposal of the legislature thereof, did not prevent the immediate passing of the title. The patent, with the definite description by metes and bounds of the lands which it would furnish, would serve a useful purpose. It would render it unnecessary for the state, or grantees from the state, to make any further proof of the character of the land should any controversies arise respecting it. In many ways,

1886.]

Opinion of the Court—Mr. Justice Field.

doubts might be created on the subject. The evidence might be conflicting as to whether the greater part of a legal subdivision fell within the description required, as being "wet and unfit for cultivation." In all such cases the patent would solve the doubt; for the determination, in that respect, of the secretary of the interior would be controlling. The ascertainment and designation of the lands, as those described, would be conclusive as against collateral attack. But the title of the state to the lands, they being swamp and overflowed, cannot be defeated, nor in any way impaired, by the delay or refusal of the secretary of the interior to have the required list made and patent issued. The state and her grantees might be embarrassed in the assertion of their rights, but no other consequence would follow.

Such is the purport of the advice given to the secretary of the interior by the attorney general of the United States in his communication of November 10, 1858. "It is not necessary," he said, "that the patent should issue before the title vests in the state under the act of 1850. The act of congress was itself a present grant, wanting nothing but a definition of boundaries to make it perfect; and to attain that object the secretary of the interior was directed to make out an accurate list and plat of the lands, and cause a patent to be issued therefor; but, when a party is authorized to demand a patent for land, his title is vested as much as if he had the patent itself, which is but evidence of his title." (9 Op. Attys. Gen. 254.)

Such is also the purport of several decisions of the supreme court of California. In *Owens v. Jackson*, 9 Cal. 322, which was an action, like the present one, for the possession of swamp and overflowed lands under a patent of the state, the defendant demurred to the complaint because it did not show that the land had been surveyed and patented to the state. The demurrer was sustained in the court below, but the supreme court reversed the decision, holding that the state had the right to dispose of the swamp and overflowed lands granted to her by the act of 1850, prior to a patent from the United States, so as to convey a present title to the patentee as against a trespasser. "The act

Opinion of the Court—Mr. Justice Field.

[July,

of congress," said the court, "describes the land, not by specific boundaries, but by its quality, and is a present legislative grant of all the public lands within the state of the quality mentioned. The patent is matter of evidence and description by metes and bounds. The office of the patent is to make the description of the lands definite and conclusive, as between the United States and the state." (See, also, *Summers v. Dickinson*, 9 Cal. 554, and *Kernan v. Griffuh*, 27 Cal. 87.)

In *Railroad Company v. Smith*, 9 Wall. 95, the question was presented to the supreme court of the United States whether the grant by the act of congress of June 10, 1852, to Missouri, of lands to aid in the construction of certain railroads, covered the swamp and overflowed lands granted to her by the act of September 28, 1850, no patent for those lands having been issued to her. After observing that there was a present grant by congress of certain lands to the states within which they lie, but by a description requiring something more than a mere reference to townships, ranges, and sections to identify them, and that it was made the duty of the secretary of the interior to ascertain the character of the lands, and furnish the state with evidence of it, the court said:

"The right of the state did not depend on his action, but on the act of congress; and, though the states might be embarrassed in the assertion of this right by the delay or failure of the secretary to ascertain and make out lists of these lands, the right of the states to them could not be defeated by that delay."

And the court further observed that, as the secretary had no satisfactory evidence under his control to enable him to make out these lists, he must, if he attempted it, rely on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed; that "the matter to be shown is one of observation and examination; and whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose."

1886.]

Opinion of the Court—Mr. Justice Field.

In *French v. Fyan*, 93 U. S. 169, this subject is further considered, and the circumstances under which parol evidence to show that lands claimed as swamp and overflowed will be received, are stated with greater precision. That was an action of ejectment for swamp and overflowed lands, and the only question raised related to the refusal of the court below to receive oral testimony to impeach the validity of a patent issued by the United States to the state of Missouri for the land in question under the act of 1850; the purpose of the testimony being to show that the land in controversy was not, in point of fact, swamp land within the meaning of that act. The land had been certified, in 1854, to the Missouri Pacific Railway company as part of the land granted to aid in the construction of its road by the act of June 10, 1852, and the plaintiff had become vested with the title of the company. To overcome this title, the defendant gave in evidence the patent to the state under the swamp land act, under which he claimed by regular conveyances. The plaintiff then offered to prove, by witnesses who had known the character of the land in dispute since 1849, that it was never wet and unfit for cultivation. The court below refused to receive the testimony, and the propriety of its ruling was thus brought before the supreme court. After observing that it had been more than once decided that the swamp land act was a grant *in presenti*, by which the title to those lands passed at once to the state in which they lay, except as to states admitted to the Union after its passage, and that the patent, therefore, which is the evidence that the lands contained in it had been identified as swamp lands, relates back and gives certainty to the title as of the date of the grant, the court said that by the second section of the act the power and duty devolved upon the secretary of the interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of the description granted, and made his office the tribunal whose decision on this subject was to be controlling, and it was his duty to have accurate lists and plats of the lands described made out and transmitted to the governor of the state, upon whose request a

patent was to be issued. Parol evidence to show that the land covered by the patent to the state was not swamp and overflowed land was therefore held to be inadmissible. In commenting upon the case of *Railroad Company v. Smith*, 9 Wall. 95, which was supposed to justify the offer of the parol testimony, the court said that "the admission of the testimony in that case was placed expressly on the ground that the secretary of the interior had neglected or refused to do his duty; that he had made no selections or lists whatever, and would issue no patents although many years had elapsed since the passage of the act." "There was no means," it added, "as this court has decided, to compel him to act. If the party claiming under the state in that case could not be permitted to prove that the land which the state had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant of the state might be defeated by this neglect or refusal of the secretary to perform his duty."

The result of these two cases in the supreme court is this: That wherever the secretary of the interior has acted, and certified the lists required by the act of 1850, and issued the patent, his determination is so far conclusive, as to the character of the land, that it cannot be collaterally attacked. But, where he has failed to make such list and issue the patent, it is competent for the state, or parties claiming from her, to prove by parol testimony that the land is of the character mentioned in the act of 1850, which passed to her.

On the seventh of April, 1874, the state, through her properly authorized officers, issued a patent of the tract in controversy to one George W. Pearson, describing it as swamp and overflowed land, and giving its metes and bounds. Through him, by various mesne conveyances, the plaintiffs trace their title, each having acquired an undivided one-third interest in the premises as tenant in common with the others. The state, by various enactments, had provided for the sale of lands of this character, and no question is made as to the conformity of the proceedings with their requirements in the issue of the patent. The objection taken is to the acquisition of any title by the state until

1886.]

Opinion of the Court—Mr. Justice Field.

the lands had been listed and patented to her by the United States. The patent of the state is the conveyance of whatever interest she had at that time in the land; and, if it were within the description of swamp and overflowed land, her interest was paramount to that of the United States, unless their title antedates the act of 1850. An attempt was made at the trial to show that it passed as an appurtenant to Mare island under the alleged Mexican grant to Castro, of which we shall hereafter speak. Laying that aside for the present, the question is, was the tract swamp and overflowed land within the act of 1850? In the absence of any action of the secretary of the interior which would be conclusive in the matter as against collateral attack, the testimony of witnesses having knowledge of the subject as to the character of the land was admissible under the decisions mentioned. That testimony clearly showed that the land was subject to periodical overflow by the rising of the tides in the bay of San Pablo, so as to make it unfit to raise the ordinary crops of the country without protecting it by levees from such overflow. The act of 1850 grants swamp and overflowed lands. Swamp lands, as distinguished from overflowed lands, may be considered such as require drainage to fit them for cultivation. Overflowed lands are those which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water, and render them suitable for cultivation. It does not make any difference whether the overflow be by fresh water, as by the rising of rivers or lakes, or by the flow of the tides. When drainage, reclamation, or leveeing is necessary to enable the farmer to use them for some of the ordinary purposes of husbandry, the lands are within the terms of the act of congress, and the title passed by it to the state. The patent of the state is thus *prima facie* evidence that the land embraced by it is of the character represented, and the testimony on the subject is without contradiction. Indeed, we do not understand that the defendant questions its force; he denies only its relevancy and competency. The main defense is founded on the theory that until the land is listed to the state, and patented by the United States, no title to

the state passes. For the reason expressed this position is not tenable.

The other defenses are that the defendant holds possession of the premises, as commander of the navy yard at Mare island, for the United States, and that they have title to the premises in controversy under a grant of the island to Victor Castro by the Mexican government, and sundry mesne conveyances from him; and that the action is barred by the statute of limitations of the state. Neither of these defenses is, in our judgment, tenable.

The fact that the defendant is an officer of the navy of the United States, and is acting under their orders, gives no justification to the retention of the premises against the claim of the true owners. The government of the United States is one of law, and their officers cannot deprive any citizen of his property except as the law authorizes it, and no law can authorize it except upon just compensation to the owner. This subject has been so fully considered in the learned and exhaustive opinion of the supreme court delivered by Mr. Justice Miller in the recent case of *United States v. Lee*, generally known as the *Arlington case*, that nothing could be added by us. (106 U. S. 196.) Its reasoning is conclusive.

The alleged grant to Victor Castro by the Mexican government covers only Mare island. The decree of confirmation rendered by the United States land commission, May 8, 1852, describes the premises thus:

"The place of which confirmation is hereby given is situated in the bay of San Francisco [San Pablo], and is called the '*Isla de la yegua*,' or 'Mare island,' and, being an island, is bounded by the water's edge."

An appeal was taken from the decree to the district court of the United States, but what action was there had upon it does not appear. The answer alleges that the title was confirmed by that court on the second of March, 1857, but no record of the fact, if such were the case, was produced. Assuming that it was confirmed, the title recognized was only to the island, "bounded by the water's edge." Without these words, the island could not be extended beyond the

1886.]

Opinion of the Court—Mr. Justice Field.

water's edge. By the common law—and by that law must decrees written in the English language be interpreted—the boundary of the island, so far as its ownership as private property is concerned, is determined by ordinary high-water mark. The shore, which belongs to the public, is the line between that mark and low-water mark, over which the daily tides ebb and flow. (*United States v. Pacheco*, 2 Wall. 589; 3 Kent Comm. 427.) If we could pass over the language of the decree, and apply the rule of the civil law, assuming that it was in force in California at the date of the grant, the extent of the land of the island susceptible of private ownership would be less than under the rule of the common law. Under neither could the private ownership of the land of the island extend to lands regularly covered each month by the flow of the tides. Such ownership was all that was conceded by the grant to Castro, and the decree affirming the claim of his grantees under it. Large portions of the land in controversy are also separated from the island by navigable sloughs.

Previously to August 31, 1852, the title which Castro possessed had become vested, by various mesne conveyances, in William H. Aspinwall and George W. P. Bissell, who on that day presented a petition to the board of land commissioners under the act of March 3, 1851, for the settlement of private land claims in California, praying for a confirmation of their claim under that grant. The decree of May 8, 1852, from which we have quoted, confirming the claim, was made upon their petition. On the fourth of January, 1853, they sold and conveyed the island to the United States; describing it as “all that tract of land called and known as ‘Mare island,’ in the bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for a navy yard there, including all the tule or low and marsh land belonging to the same, or which has ever been reputed or claimed to belong to the same.”

This description is more extensive than the one given in the grant to Castro, or by the commissioners in the decree confirming the claim under it. Nothing is said, in either

Opinion of the Court—Mr. Justice Field.

[July,

grant or decree, of tule or low or marsh land belonging to the island, or which has been reputed or claimed to belong to it. These words are of the vaguest character. Whatever may have been intended by them, certain it is that the grantors, Aspinwall and Bissell, could only convey what they acquired under the grant, and the United States took, and could only take, such interest; and that, as we have seen, was limited to the island, bounded by the water's edge.

From the date of that conveyance the United States have been in possession of the island, and have constructed there large and expensive buildings for the uses of a navy, including a navy yard. They have also occasionally asserted ownership over the adjacent overflowed lands, but the acts done by them were not of a character to indicate any settled purpose of occupying the lands, or devoting them to any public uses. They have not constructed any levees to prevent their overflow, or made any efforts to reclaim the lands, or to subject them to any uses of the government. Two shanties, ten-by-twelve, erected in 1874 or 1875 on the lands nearly eight miles distant from the island, were soon abandoned, and no other buildings have been erected on them. It is plain that the acts which the United States are said to have done to mark their control of the overflowed lands, if done by a private party, would not bar the plaintiffs from asserting their right of possession. There was on their part no such possession as would set the statute of limitations running, and which in time might ripen into a title against the true owners. It was not open, exclusive, and continuous, such as to give notice to the owners of an intention to claim title adversely to them; and the testimony indicates that the plaintiffs were ignorant of any adverse claim on the part of the United States till a short time before the commencement of this suit. It was not accompanied by any of the ordinary acts indicating ownership, and at no time were any such acts done except in the instance mentioned, where the two shanties were constructed, but soon afterwards abandoned.

But, independently of this consideration, we doubt very much whether the United States can acquire title by adverse possession against the right of a private citizen. The theory

1886.]

Opinion of the Court—Mr. Justice Field.

that an open and uninterrupted possession of land by a party, not being the real owner, may ripen into title, is founded upon the supposed acquiescence of the owner in the claim of the occupant by his not entering upon the property, or taking legal proceedings to recover its possession. Statutes of limitation do not run against the United States except when expressly provided by congress, and no action will lie against them by a private citizen except by their consent. Legal proceedings to enforce the claim of a citizen to lands in possession of the United States could not, therefore, be taken, and no statutes can run against one to whom the courts are closed for the maintenance of his claim. Nor could the citizen assert his claim to such lands by entering upon them. There can be no private entry upon land for the assertion of one's rights, where the law does not allow an action against the occupant for the possession. In the present case the United States are not sued. They cannot be sued. The defendant is not sued in his official character, but as an individual. He is alleged to be in possession. He admits that he is, and justifies that possession by alleging that he is an officer of the United States, and acting under their authority. He can only make good this defense by showing that the United States were lawfully authorized to put him in possession of the land, and such authority they only possessed if they held the title, or had the assent of the owner, neither of which is shown in the present case.

We do not give any weight to the fact that in 1853, by order of the president of the United States, Mare island was reserved, with all its alleged appendages of tule or marsh lands ordinarily reputed to belong to such island; for, if such reservation was intended to include all the swamp and overflowed lands in controversy, it was to that extent inoperative,—the title, as we have already seen, having passed to the state by the act of September 28, 1850.

It follows from what we have said that findings must be had upon all the issues in favor of the plaintiffs, and judgment entered thereon in their favor for the possession of the premises in controversy.

INDEX.

ABANDONMENT.

See MINING CLAIMS.

ABATEMENT.

1. PLEA IN ABATEMENT.—The defendant pleaded in abatement that the plaintiff was not a citizen of the State of Nevada, as he alleged, but of California, to which the plaintiff replied; when the plea was duly set down for hearing, without any evidence being taken or offered in support thereof, and overruled, and the defendant allowed a day within which to answer to the merits; *Held*, that the plea was properly disposed of, and that the question of plaintiff's citizenship, for the purposes of the case, was thereby determined, unless a rehearing was asked for and allowed, and that the same defense could not be made again in the answer to the merits. *Sharon v. Hill*, 290.
2. ACTION ON AN ENTIRE DEMAND.—Where an action is brought on a part only of an entire and indivisible demand, the pendency thereof may be pleaded in abatement of another action on the remainder, and a judgment in either may be pleaded in bar of the other. *Hughes v. D. M. & T. In. Co.*, 545.

ADMIRALTY.

1. SALVAGE—AMOUNT OF AWARD—HOW ESTIMATED.—The elements which enter into the estimate in fixing the amount of compensation for a salvage service are: (1) The value of the property saved and of that employed in saving it; (2) the degree of peril from which the saved property is delivered; (3) the risk to which the property and persons of the salvors are exposed; (4) the severity and duration of the labor; (5) the promptness with which the services are interposed; and (6) the skill, courage, and judgment involved in the services. *Queen of Pacific*, 195.
2. SAME—DECREE OF DISTRICT COURT AFFIRMED.—As in this case all of the elements which go to justify the largest allowance are found, except that the duration of the labor was not long, and the risk to the salvors and their property, though very considerable, was not of a very extreme character, the decree of the district court awarding sixty-four thousand seven hundred dollars, or about ten per cent. of the value of the property saved, is affirmed, with interest upon the amount of the award from the date of the decree of the district court at the rate of six per cent. *Ib.*
3. CARRIER DAMAGE TO CARGO.—Libel dismissed on satisfactory proof that it could not have been caused by the fault of the carriers. *The Zealandia*, 405.
4. JOINDER OF CAUSES OF ACTION IN REM AND PERSONAM.—The admiralty rules from 12 to 20, inclusive, relating to joinder of causes of action do not apply to cases not therein enumerated; but the same, under rule 46, may be proceeded with, in this respect, in such manner as the court may deem expedient for the administration of justice. *The Director*, 493.

5. **SUIT ON A CHARTER PARTY.**—In a suit by a shipper for the non-performance of a contract of affreightment, the facts which establish the liability of the master, also give the libellant a lien on the vessel for the amount of his claim, and therefore it is proper and expedient that the proceeding against the owner or the master and the vessel should be joined in one libel. *Ib.*
6. **REPLEVIN IN ADMIRALTY.**—When the possession of personal property has been changed by means involving the breach of a maritime contract concerning the same, or such possession is wrongfully withheld contrary thereto, the owner or other person entitled, under the circumstances, to the possession thereof, may maintain a suit in admiralty to obtain the same. *Ib.*
7. **DAMAGES—GENERAL AND SPECIAL.**—Damages that are not the necessary result of the act complained of, and therefore not implied by law, are special, and the facts constituting them must be particularly stated in the libel. *Ib.*
8. **PILOTAGE ON COLUMBIA RIVER—RIGHT OF MASTER TO CHOOSE PILOT.**—The Columbia river is the boundary between two states—Oregon and Washington—within the purpose and spirit of section 4236 of the revised statutes, and therefore the state of Oregon cannot require a vessel bound in or out of said river to take an Oregon pilot or pay him half or any pilotage, if the master thereof prefers to and does take a Washington pilot. *The Abercorn*, 530.

AGENCY.

1. **AGENCY—NOTICE.**—The knowledge of an agent, in respect to the subject matter of the agency, is the knowledge of the principal. *Lakin v. S. B. G. M. Co.*, 231.

ALASKA.

1. **ALASKA—NOT "INDIAN COUNTRY."**—Alaska is not "Indian country," in the sense in which that phrase is used in the intercourse act of 1834 and the revised statutes. *Kie v. U. S.*, 579.
2. **IDEM—JURISDICTION OF DISTRICT COURT THEREIN.**—The district court of Alaska has jurisdiction under sections 5339 and 5341 of the revised statutes, to try and punish any inhabitant of the district for the crime of murder or manslaughter committed by the killing of any human being therein; but the law of Oregon defining the crime of murder or manslaughter, and prescribing the punishment therefor, is not in force in Alaska. *Ib.*
3. **ERRONEOUS SENTENCE.**—The plaintiff in error being convicted of manslaughter, was sentenced to punishment therefor under the law of Oregon instead of the act of 1875 (18 Stats. 473), whereby his imprisonment was authorized for twenty days in excess of the punishment allowed by said act: *Held*, that the judgment was erroneous, and the same was reversed, with direction to have the plaintiff in error sentenced according to law. *Ib.*

ATTORNEY AND CLIENT.

1. **CASE IN JUDGMENT.**—H. was appointed the attorney of the defendant—a foreign corporation engaged in loaning money in Oregon on note and

mortgage—and on February 12, 1883, after being so employed about eight years, he brought an action against said corporation to recover the sum of twenty-one thousand two hundred and fifty-eight dollars and eighty cents, the alleged value of his services for that period, without specifying any particular service, except attending to two suits, for which he claimed the sum of seven hundred and fifty-five dollars and eighty cents, and had judgment therein for eight thousand four hundred and seven dollars and sixty-one cents and three hundred and ninety dollars and five cents costs and disbursements; and afterwards, on September 5, 1884, he brought this action against said corporation to recover the sum of eleven thousand two hundred and twenty-two dollars and seventy-four cents, with interest from January 31, 1880, for services as an attorney during the period covered by the former action in making and delivering to the defendant five hundred and fifty-four certificates of the title to lands offered to the latter as security for loans, the sum demanded being equal in amount to one per centum of the moneys loaned on the lands included in said certificates: *Held*, that the claim now sued for was a part of an entire and indivisible demand and cause of action existing when the former action was brought, and that the judgment therein is a bar to this action. *Hughes v. D. M. & T. In. Co.*, 545.

2. **ATTORNEY AND CLIENT.**—The services of a standing or regularly appointed attorney are usually rendered pursuant to some general agreement or understanding, and whatever is due therefor at the expiration of the service or employment constitutes but one cause of action; and courts should be careful in such cases, in the application of a rule against splitting up demands, not to leave any loophole through which an attorney may be tempted to harass and oppress his client with vexatious or spiteful litigation. *Ib.*
3. **JUDGMENT NOT SUSPENDED BY WRIT OF ERROR.**—A writ of error is in the nature of a new suit to set aside or annul a judgment for error of law apparent on the face of the record, and pending the same the judgment is in full force and effect as a bar or an estoppel. *Ib.*
4. **INCONSISTENT POSITIONS IN COURT.**—A party who takes a position in the course of a litigation is estopped to act inconsistently therewith, so long as the same is unretracted, and this includes the case of one who having taken a judgment of this court against himself, to the supreme court on a writ of error, attempts, while said proceeding is still pending, to plead said judgment in bar of an action against himself by the plaintiff therein. *Ib.*
5. **ATTORNEY'S FEES.**—A contract to pay an attorney four hundred dollars a month to attend to certain litigation: *Held*, to have been tacitly abandoned by reason of unforeseen delays in the progress of the litigation, and a gross sum allowed for the services of the attorney thereafter. *Hickox v. Elliott*, 624.

ATTORNEY'S FEES.

See ATTORNEY AND CLIENT.

AUTHORS' RIGHTS.

See INJUNCTION.

BONDS AND COUPONS.

1. COUPONS—LIMITATIONS.—A right of action accrues upon coupons at the moment they fall due, and the statute of limitations commences to run upon coupons from their maturity. *Nash v. El Dorado Co.*, 86.
2. INTEREST ON COUPONS.—Under section 1,917, civil code of California, where there is no special provision as to interest upon bonds and coupons, both the bonds and coupons bear interest, after maturity, at the ordinary legal rate, whether the coupons are detached from the bonds or not. *Ib.*

BRIDGE.

1. NAVIGABLE WATERS IN OREGON—POWER OF THE STATE OVER.—Under the ruling in *Cardwell v. Bridge Company*, 113 U. S. 205, the provision in the act of congress of February 14, 1859 (11 Stat. 383), admitting Oregon into the Union, which declares that "the navigable waters of said state shall be common highways and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll therefor," does not prevent the state from authorizing the erection of a bridge across the Wallamet river at Portland, however much it may impede and obstruct the navigation thereof; nor has the United States circuit court any jurisdiction of a suit to enjoin the same. *Sheerer v. Col. River Bridge Co.*, 575.

BURDEN OF PROOF.

1. *IDEM*—BURDEN OF PROOF.—When a creditor relinquishes a lien he may have on the property of his debtor, in a suit to collect his debt from the surety, the burden or proof is on him to show that the surety was not injured by such relinquishment. *Allen v. O'Donald*, 45.
2. BURDEN OF PROOF.—The burden rests on the party claiming protection as a *bona fide* purchaser, to prove, affirmatively, the payment of value, and, that the purchase was made without notice of the prior equity. *Lakin v. S. B. G. M. Co.*, 231.

CHAMPERTY.

1. CHAMPERTY—LIMITATION.—The former ruling of this court in this case (10 Sawy. 415), that the agreement made in California, on February 10, 1874, between S. G. Elliott and Martin White for the loan and repayment of money, was to be performed in that state, and is not champertous; and that a suit may be maintained to enforce a security for a debt arising thereon, without reference to whether an action on the debt directly against the debtor can be maintained or not, considered and affirmed. *Hickox v. Elliott*, 624.
2. *RES JUDICATA*.—The obligation of White under said agreement, and the fact of his having performed the same, is *res judicata* since July 13, 1875, by the judgment of a competent court, in *White v. Elliott*. *Ib.*

CHINESE.

1. CHINESE RESTRICTION ACTS—MERCHANTS TEMPORARILY DEPARTING.—A Chinese merchant, residing and doing business in the United States, who temporarily departed therefrom before the passage of the Chinese restriction act, is entitled to re-enter the same without producing the certificate required by section six of the act of 1882, as amended in 1884. *In re Ah Ping*, 17.

2. **THE SAME—RESTRICTION ACTS HOW CONSTRUED.**—The acts of congress, commonly called the Chinese restriction acts, should be so construed, if possible, as not to bring them into conflict with stipulations in the treaties between the United States and China. *Ib.*
3. **APPEALS—HABEAS CORPUS.**—Under section 764 R. S., amended by the act of March 3, 1885, (Session Laws, 1885, 437) the right of appeal in *habeas corpus* cases is absolute, and not dependent upon the discretion of the judge, to allow, or deny, an appeal. *In re Sung Hung*, 173.
4. **CHINESE RESTRICTION ACT.**—Policy of allowing appeals on questions of fact, arising under the Chinese restriction act, discussed, and limitations on the right of appeal suggested. *Ib.*
5. **CHINESE RESTRICTION ACT—RIGHT OF CHINAMAN DETAINED ON BOARD VESSEL TO HABEAS CORPUS.**—The refusal to allow a Chinese passenger to land is a restraint of his liberty, within the meaning of the *habeas corpus* act, and it is the duty of the court, justice, or judge to whom the application for a writ of *habeas corpus* is made, to forthwith award the writ, unless it appears from the petition itself that the party is not entitled thereto. (Rev. Stat., sec. 755.) *Jung Ah Lung*, 211.
6. **SAME—DECISION OF COLLECTOR NOT RES ADJUDICATA.**—The court, in investigating the legality of the detention of a Chinese passenger on board a vessel, in such a case, is not bound or controlled by the decision of the collector of the port, or his deputy, as to the right of such passenger to land. *Ib.*
7. **POWER OF THE COUNCIL OF PORTLAND TO PUNISH FOR OPIUM SMOKING.**—Subdivision 6 of section 37 of the charter of Portland authorizes the council "to prevent and suppress opium smoking, and houses or places kept therefor, and to punish any keeper of such house or place or person who smokes therein or frequents the same." *Held*, That no person can be punished for opium smoking under this authority, unless it be done in a house or place kept for that purpose. *Ah Lu*, 447.
8. **LAUNDRIES—CONSTITUTIONAL LAW.**—An ordinance, which makes it an offense, for any person to maintain, or carry on a laundry, wherein clothes are cleaned for hire, within the habitable portion of the city of Stockton, is unconstitutional, and void. *Ti Loy*, 472.
9. **FOURTEENTH AMENDMENT.**—Such ordinance violates the fourteenth amendment of the national constitution, in the following particulars: 1. It abridges "the privileges and immunities of citizens of the United States." 2. It violates the personal liberty of the citizen. 3. It operates to deprive the citizen of property without due process of law. 4. It deprives citizens of the equal protection of the laws. *Ib.*
10. **POLICE POWER.**—The ordinance is not within the legitimate scope of the police power of the state, invoked to sustain it. *Ib.*
11. **SECTION 753, REVISED STATUTES,** authorizes the discharge of the petitioner. *Ib.*
12. **EXPULSION OF CHINESE—VIOLATION OF THE TREATY AND LAW PERMITTING THEM TO RESIDE IN THE UNITED STATES.**—The grand jury advised to find indictments under section 5336 of the R. S., against persons guilty of driving or attempting to drive the Chinese out of the country, or of maltreating or intimidating them for the purpose of constraining them to depart from the country, because such conduct is calculated and *prima facie* intended, to prevent and hinder the execution, operation or fulfillment of the treaties and laws of the United States permitting the Chinese to reside here. *Grand Jury*, 522.

13. **CONSTITUTIONAL LAW—SECTION 5519, REVISED STATUTES.**—The constitutionality of section 5519 of the revised statutes of the United States, so far as it embraces a conspiracy to deprive Chinese residents of any state, of the privileges and immunities secured to them by existing treaties, discussed, and a certificate of opposition of opinion between the judges granted. *In re Baldwin*, 533.

CITIZENSHIP.

1. **CITIZENSHIP.**—Citizenship is a *status* or condition, resulting from both act and intent; and no one can become a citizen of any state of the Union by merely intending to, nor by residence therein without or contrary to such intent; but the former is evidence more or less cogent, according to circumstances of the latter. *Sharon v. Hill*, 291.
2. **IDEM—FOURTEENTH AMENDMENT.**—The first clause in section 1 of the fourteenth amendment is a restraint on the power of a state, so that it cannot exclude a citizen of the United States, resident therein, from the citizenship thereof; but such amendment does not have the effect to make such resident a citizen of such state against his will and intention. *Ib.*

CONSIDERATION AND FAILURE OF.

See **CONTRACT**.

CONSTITUTIONAL LAW.

1. **SPECIAL LIMITATION ACTS CONSTITUTIONAL.**—The Legislature of the State of California has the power to pass special acts of limitation, applicable to a particular county indebtedness. *Nash v. El Dorado Co.*, 86.
2. **IDEM—FOURTEENTH AMENDMENT.**—The first clause in section 1 of the fourteenth amendment is a restraint on the power of a state so that it cannot exclude a citizen of the United States, resident therein, from the citizenship thereof; but such amendment does not have the effect to make such resident a citizen of such state against his will and intention. *Sharon v. Hill*, 290.
3. **SAME—LAUNDRY ORDINANCE—CONSTITUTIONAL LAW.**—On this ground the circuit court declined to hold a city ordinance invalid, as being in contravention of the fourteenth amendment to the constitution of the United States, which ordinance made it an offense "for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." *Wo Lee*, 429.
4. **LAUNDRIES—CONSTITUTIONAL LAW.**—An ordinance which makes it an offense, for any person to maintain, or carry on a laundry, wherein clothes are cleansed for hire, within the habitable portion of the city of Stockton, is unconstitutional and void. *Tie Loy*, 472.
5. **FOURTEENTH AMENDMENT.**—Such ordinance violates the fourteenth amendment of the national constitution, in the following particulars: 1. It abridges "the privileges and immunities of citizens of the United States." 2. It violates the personal liberty of the citizens. 3. It operates to deprive the citizen of property without due process of law. 4. It deprives citizens of the equal protection of the laws. *Ib.*
6. **POLICE POWER.**—The ordinance is not within the legitimate scope of the police power of the state, invoked to sustain it. *Ib.*

7. SECTION 753, REVISED STATUTES, authorizes the discharge of the petitioner. *Ib.*
8. CONSTITUTIONAL LAW—SECTION 5519, REVISED STATUTES.—The constitutionality of section 5519 of the revised statutes of the United States, so far as it embraces a conspiracy to deprive Chinese residents of any state, of the privileges and immunities secured to them by existing treaties, discussed, and a certificate of opposition of opinion between the judges granted. *In re Baldwin*, 533.

See RAILWAY CORPORATION, CHINESE.

CONVEYANCE.

1. CONSIDERATION IN DEED NOT EVIDENCE.—An acknowledgment of payment of consideration in a deed, is not evidence of payment of value, as against the owner of the prior equity. *Lakin v. S. B. G. M. Co.*, 231.

CONTRACT.

1. A CONTRACT TO BUILD OR REPAIR.—A court of equity, as a rule, will not enforce the performance of a contract to construct or repair a railway. *O. R. C. v. O. R. & Nav. Co.*, 33.
2. ARTICLE TO BE SATISFACTORY TO PURCHASER—Where a contract is made to make and deliver an article which shall be satisfactory to the purchaser, the article must be satisfactory to him, or he is not bound to take it. *S. M. Co. v. Chico*, 183.
3. IT IS NOT SUFFICIENT THAT IT OUGHT TO BE SATISFACTORY—It must, in fact, be satisfactory. *Ib.*
4. BAD FAITH IN PARTY TO BE SATISFIED—Where the party to be satisfied is, in fact, satisfied, but in bad faith, and in fraud of the rights of the other contracting party, declares that he is not satisfied, the contract has been fully performed, and the purchaser is bound to accept the article contracted for. *Ib.*
5. COMMITTEE TO BE SATISFIED—Where a steam fire engine was contracted for, to be satisfactory to the fire committee of the town, and there was a change in the members of the committee after the contract was made, and before the tender of the engine, under it: *Held*, that the committee to be satisfied is the committee existing at the time of the performance of the contract and tender of the engine. *Ib.*
6. PROMISSORY NOTE—ASSIGNMENT OF MAIL CONTRACT—CUTTING DOWN ROUTE—FAILURE OF CONSIDERATION—PAROLE EVIDENCE INADMISSIBLE TO VARY WRITTEN CONTRACT.—The defendants executed their promissory note in pursuance of a written contract for and in payment of an assignment to them of a governmental contract for carrying the mails, over a route which was, under the existing law, liable at any time to be cut down by the government, with a corresponding reduction of the amount to be paid. The route was cut down, after the assignment, and a corresponding reduction made in the amount of money paid under the mail contract: *Held*, in an action on said note, that the cutting down of the route, and the reduction of the amount paid, did not constitute a partial failure of consideration for the note; and that in the absence of such provision in the written contract for the assignment, parole evidence was inadmissible to show a verbal agreement, at the time the contract was made, whereby the defendants were to be liable, on their note, only for the portion of the route that was continued. *W. F. & Co. v. Carr*, 272.

7. **VENDOR AND VENDEE—CONTRACT—CONSIDERATION—WRITTEN CONTRACT.**—The real consideration for a contract to convey may be shown, although the contract states only a nominal one. *Waterman v. Waterman*, 489.
8. **CONTRACT—ADEQUACY OF CONSIDERATION—EVIDENCE.**—Where a party advances several thousand dollars to develop certain silver mines, in consideration of which he is to be repaid out of their first product, and receive in addition an undivided fractional part of the mines: *Held*, that the contract cannot be avoided on the ground that the consideration was inadequate. *Ib.*
9. **SAME—UNCERTAINTY—HARDSHIP.**—On the same state of facts: *Held*, that the contract cannot be avoided on the ground that the property to be conveyed is uncertain, or that the performance of the contract would work hardship. *Ib.*
10. **SAME—MUTUALITY—OPTION.**—In an action on a contract, want of mutuality cannot be set up as a defense by the party who has received the benefit, simply because it was left optional with the other party as to whether he would enforce his right. *Ib.*
11. **SAME—SECURITY—EVIDENCE.**—Evidence considered, and *Held* not to sustain the position that the contract of convey was given simply as security for the money advanced. *Ib.*

CONTEMPT.

1. **THE JURISDICTION OF THE UNITED STATES COURTS** of offenses committed in places in California purchased by the United States, by the consent of the legislature of the state, for a custom house, and other needful buildings, and used for such buildings, is exclusive. *Sharon v. Hill*, 132.
2. **DEADLY WEAPONS—CONTEMPT AND OFFENSES.**—The drawing of a pistol, and threatening the lives of counsel, in the presence of an examiner in chancery while taking testimony in an equity case, pending in the United States circuit court, in the chambers of the judge adjoining the courtroom, situate upon land thus under the exclusive jurisdiction of the United States, is both a contempt of court, punishable as such, and an offense under the statutes of the United States, punishable on indictment. *Ib.*
3. **CONTEMPT OF COURT—OFFENSES UNDER THE STATUTE.**—Where the same acts constitute offenses against the United States, punishable upon information or indictment, and at the same time a contempt of court, punishable as such, and there is no special end, in the administration of justice, to be accomplished by proceeding, summarily, on process for contempt, the court may waive the process for contempt, and leave the government to proceed to punish the offense under the statute. *Ib.*
4. **ARMED ATTORNEYS.**—The going into court, by members of the bar, armed with deadly weapons, characterized as not only a contempt of court, but also *professional misconduct*, that ought to be punished by suspension from practice or disbarment. *Ib.*
5. **INJUNCTION—MODIFICATION OF ORDER—SERVICE OF PAPERS.**—The rules and practice of the circuit court of the ninth circuit, on an order to show cause why an injunction should not be modified, require copies of all the moving papers to be served with the order; and mere supporting affidavits cannot be filed in opposition to the affidavits showing cause, where the latter only controvert the moving affidavits, and do not set up

any new affirmative matter constituting a defense. *Hardt v. Liberty Hill C. M. & W. Co.*, 611.

6. **CONTEMPT—VIOLATION OF INJUNCTION—MINING DEBRIS.**—Running a tunnel twenty-five hundred feet into respondent's mine, and washing the earth removed therefrom, and washing the earth from caves of the banks, occurring from time to time, by a hydraulic monitor, and other washings of earth and debris by water flowing over the high banks of the mine into a tributary of the Yuba river, constitute a violation of the injunction perpetually restraining defendants "from discharging or dumping into the Yuba river or its tributaries any of the tailings, boulders, cobble-stones, gravel, sand, clay, debris, or other refuse matter," from any of their mines; and a contempt. A fine of fifteen hundred dollars imposed as a punishment for the contempt. *In re N. Bloom. G. M. Co.*, 590.

CORPORATIONS.

1. **COUNTIES ARE CORPORATIONS SUBJECT TO BE SUED.**—Section 4,000 political code, constitutes counties corporations, and sections 4,002-3 authorize them to be sued. *Nash v. Eldorado Co.*, 86.

See RAILWAY CORPORATIONS.

COSTS.

1. **COSTS—FINAL HEARING IN EQUITY—SECTION 824 REVISED STATUTES CONSTRUED.**—To constitute "a final hearing in equity or admiralty," within the meaning of section 824, R. S., there must be a hearing of the cause on its merits, that is, a submission of it to the court, in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in his bill or libel, on the ground for the permanent relief which his pleading seeks, on such proof as the parties place before the court, be the case one of *pro confesso* on bill, or libel and answer, or pleadings alone, or pleadings and proofs. *Mercartney v. Crittenden*, 113.

COURTS MARTIAL.

1. **COURTS MARTIAL—JURISDICTION OF CIVIL COURTS—HABEAS CORPUS.**—Within the sphere of their jurisdiction, the judgment and sentences of courts martial are as final and conclusive as those of civil tribunals of last resort, and the only authority of the civil courts is to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, they cannot be interfered with, no matter what errors may be committed in the exercise of their lawful jurisdiction. *In re McVey*, 25.

CRIMINAL LAW.

1. **JOINDER OF OFFENSES—TRIAL AND PUNISHMENT THEREFOR.**—When two or more distinct offenses are joined in one indictment, under section 1024 of the revised statutes, or two or more indictments therefor are consolidated, the jury may find the defendant guilty of one charge and not of another, and may find a verdict as to one or more of the charges, and be discharged from the consideration of the remainder, on which the defendant may be thereafter tried, as if a jury had not been impaneled in the case; and the defendant may be sentenced to receive the maximum punishment for each offense or charge of which the jury may find him guilty. *Ex parte Hibbs*, 452.

2. **FORGERY—WHEAT CONSTITUTES.**—The postmaster at Lewiston, Idaho, issued a postal money order on the application of a fictitious person, without consideration therefor, payable to a certain bank, to which he at the same time wrote in the name of such person, directing that the amount of the order be collected and remitted to him, at Pierce city, in a registered package, which he intercepted as it passed through his office, and converted the contents to his own use: *Held*, that the act of the postmaster constituted forgery, both at common law and under the statute of the United States. (Sec. 5463, R. S.) *Ib.*
3. **PERJURY—SECTION 2294 OF THE REVISED STATUTES.**—An applicant for the entry of land, under the homestead act, may make oath to the exculpatory facts that authorize him to verify the affidavit accompanying his application, before the clerk of the county, as provided in section 2294 of the revised statutes, and if such oath is willfully and knowingly false in any material particular, or includes a statement of fact which such applicant did not believe, he is guilty of perjury as defined by section 5392 of the revised statutes. *U. S. v. Hearing*, 514.
4. **IDEM—ALLEGATION THAT OATH IS "CORRUPTLY" FALSE.**—It is not necessary in an indictment under section 4392 of the revised statutes to allege that the oath of the defendant was "corruptly" false, but it is sufficient to describe the offense in the language of the statute. *Ib.*
5. **JURAT.**—In an indictment for perjury in swearing to an affidavit, it is not necessary that it should appear that the officer before whom the oath was taken wrote a jurat or memorandum of the transaction on the instrument; but it is sufficient, after setting out the affidavit, to allege that the defendant, being duly sworn, did depose and say that the same was true; and the facts may be proved by parole. *Ib.*
6. **ALLEGATION THAT DEFENDANT WAS SWORN.**—In an indictment for perjury it must distinctly appear that the defendant was duly sworn. *Ib.*
7. **EXPULSION OF CHINESE—VIOLATION OF THE TREATY AND LAW PERMITTING THEM TO RESIDE IN THE UNITED STATES.**—The grand jury advised to find indictments under section 5336 of the R. S., against persons guilty of driving or attempting to drive the Chinese out of the country, or of maltreating or intimidating them for the purpose of constraining them to depart from the country, because such conduct is calculated and *prima facie* intended, to prevent and hinder the execution, operation or fulfillment of the treaties and laws of the United States permitting the Chinese to reside here. *Grand Jury*, 522.
8. **PRESENCE OF THE DEFENDANT.**—In the trial of a criminal action involving corporal punishment, the record should show that the defendant was present; but it is sufficient if his presence may be fairly inferred from the whole record, without being explicitly stated at every stage of the procedure. *Kle v. U. S.*, 581.

CUSTOMS.

See DUTIES.

DAMAGES, AND MEASURE OF.

1. **MEASURE OF DAMAGES IN ACTION FOR THE CONVERSION OF TIMBER.**—An innocent purchaser, from a willful trespasser, of timber cut on the public land is liable for the value of the timber at the date of such purchase, including the increased value which said trespasser had bestowed upon it. *U. S. v. Helmer*, 406.

2. **CASE IN JUDGMENT.**—H. purchased 50,000 feet of lumber at the mill of E., made from timber willfully cut from the public land by the latter without the knowledge of H., and hauled the same to Baker City, a distance of twenty miles, at a cost of \$5 per thousand, where he disposed of it at \$15 per thousand: *Held*, that in an action by the United States to recover damages for the conversion of said timber, the true measure thereof was the value of the lumber at the mill. *Id.*
3. **NEW TRIAL—INTEREST ON VALUE OF PROPERTY CONVERTED.**—On the trial it was taken for granted that the lumber was delivered to the defendant at Baker City, and the jury took its value there as the measure of damages; but on a motion for a new trial, it being admitted that the defendant paid for hauling the lumber to that place, and no objection being made to the omission to prove that fact on the trial, a new trial was granted the defendant, unless the plaintiff would remit the cost of hauling, \$250, less \$120, the amount of three years' interest on the value of the lumber at the mill, which the plaintiff had omitted to claim on the trial. *Id.*
4. **DAMAGES ALLOWED PASSENGERS FOR BAD QUALITY OF FOOD.** *Bark Murray*, 416.
5. **DAMAGES—GENERAL AND SPECIAL.**—Damages that are not the necessary result of the act complained of, and therefore not implied by law, are special, and the facts constituting them must be particularly stated in the libel. *The Director*, 494.

DEDICATION OF STREETS.

See **PORTLAND**.

DEMURRER.

See **ESTOPPEL**.

DEPOSITIONS.

1. **DEPOSITIONS—OBJECTION TO.**—A technical objection to evidence taken in a suit in equity must be made by motion to suppress before the cause is set for hearing. *Hickox v. Elliott*, 624.

DUTIES.

1. **DUTIABLE VALUE OF IMPORTED MERCHANDISE—VALUE OF COVERING NOT TO BE INCLUDED THEREIN.**—Section 7 of the Act of March 3, 1883 (22 Stat., 523), not only repeals section 2907 of the R. S., authorizing the value of the "covering" to be added to the wholesale price of imported merchandise for the purpose of ascertaining its dutiable value, but positively prohibits the value of such "covering" from being estimated as a part of such dutiable value, and therefore the value of barrels in which Portland cement is imported cannot be added to the wholesale price of the latter as an element of its dutiable value. *Meyers v. Shurtleff*, 50.
2. **ASSISTANT SECRETARY OF THE TREASURY—AUTHORITY OF.**—The assistant secretary of the treasury is not the deputy of the secretary, but only his aid, and his acts are not valid unless specially authorized by law or prescribed by the secretary (sections 161, 245, R. S.); but a letter written by him to a collector of customs concerning the deposit of money in his custody, will be presumed to have been written by authority of the secretary until the contrary appears. *U. S. v. Adams*, 103.

3. **CASE IN JUDGMENT.**—In 1866, A was collector of customs at Astoria, Oregon, when and where he received a letter signed by the assistant secretary of the treasury, directing him to take forty-six thousand five hundred dollars in gold coin, theretofore received by him in payment of duties, and then in his custody, to San Francisco, and deposit the same with the assistant treasurer; in pursuance of which direction the collector sailed for San Francisco on the current steamer with said money in his trunk, and on the way twenty thousand dollars of the same was stolen therefrom, without any want of ordinary care and diligence on his part, a portion of which was afterward recovered, so as to reduce the loss to twelve thousand six hundred and ninety-sixty dollars and twenty-eight cents, for which the government sued the collector and his sureties on their bond; the defendants pleaded these facts in defense, and claimed they were not liable on the bond, to which the plaintiff demurred. *Held*: 1—that the carriage of this money to San Francisco was no part of the duty of A as collector (section 3639, R. S.), and therefore his sureties are not responsible for his conduct while so engaged; and 2—that in the transportation of said money, A was simply acting as a private carrier for the government, and is not liable on his bond for his conduct, or otherwise, except for the want of ordinary care and diligence. *Id.*

EQUITY.

1. **A CONTRACT TO BUILD OR REPAIR.**—A court of equity, as a rule, will not enforce the performance of a contract to construct or repair a railway. *Or. R. Co. v. O. R. & Nav. Co.*, 33.
2. **ALLEGATION IN ANSWER IN EQUITY, WHEN EVIDENCE FOR THE DEFENDANT.**—When a defendant, in his answer, admits a fact stated in the bill, and then undertakes to avoid it by another fact, the admission is not qualified by the matter in avoidance, which is not deemed responsive to the bill, unless the admission and avoidance constitute but one fact or transaction, in which case the answer is deemed responsive to the bill and evidence of the whole statement, including the matter in avoidance. *Reid v. McCallister*, 35.
3. **CONCLUSIONS OF LAW.**—It is sometimes necessary and proper in equity pleadings to make deductions from the facts stated, that are more or less conclusions of law. *Allen v. O'Donald*, 45.
4. **COSTS—FINAL HEARING IN EQUITY—SECTION 824 REVISED STATUTES CONSTRUED.**—To constitute “a final hearing in equity or admiralty,” within the meaning of section 824, R. S., there must be a hearing of the cause on its merits, that is, a submission of it to the court, in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in his bill or libel, on the ground for the permanent relief which his pleading seeks, on such proof as the parties place before the court, be the case one of *pro confesso* on bill, or libel and answer, or pleadings alone, or pleadings and proofs. *Mercartney v. Crittenden*, 113.
5. **EXCEPTIONS TO ANSWER IN EQUITY FOR INSUFFICIENCY.**—Exceptions for insufficiency of answer to particular allegations in bills of equity only lie where a discovery is sought—where the complainant seeks evidence to sustain his bill. *U. S. v. McLaughlin*, 139.
6. **SAME—CORPORATIONS—INFANTS, ETC.**—Such exceptions do not lie to answers of corporations; to answers wherein the defendant's oath is

- waived; to answers of the attorney general, or to answers of infants; because such answers are not evidence. *Ib.*
7. THE FOUNDATION FOR AN EXCEPTION FOR INSUFFICIENCY consists of a sufficient allegation in the bill and a sufficient interrogatory based upon it. *Ib.*
 8. SAME—Under the old equity practice, the general interrogatory, at the end of the bill, requiring defendant "to answer every allegation as fully and particularly as if specifically interrogated thereto," was held to afford a foundation for an exception for insufficiency. But it was necessary that there should be either a special interrogatory, or this general requirement. *Ib.*
 9. UNDER EQUITY RULES 41-43, it is, at least, doubtful, whether an exception, for insufficiency would now lie in the national courts without a special interrogatory. *Ib.*
 10. PRACTICE OF EXCEPTING FOR INSUFFICIENCY OBSOLETE AND DANGEROUS TO COMPLAINANT—Where the parties are competent witnesses, the practice of calling for a discovery, and excepting to answers for insufficiency, is useless and becoming obsolete. The great inconvenience and danger to complainant of pressing the defendant to positive denials by exceptions, pointed out. *Ib.*
 11. BILLS OF DISCOVERY OBSOLETE—Whether a pure bill of discovery will lie, where the parties are competent witnesses, *quære?* *Ib.*
 12. EXCEPTIONS FOR IMPERTINENCE—The court will not order matter excepted to as impertinent to be stricken out, unless its impertinence is very fully and clearly made to appear. Nor will the court strike out matter as impertinent because there are here and there a few unnecessary words. *Ib.*
 13. FINAL LOCATION OF RAILROAD LAND GRANT—Suggestion as to when location becomes definitely fixed, under the Union Pacific Railroad grant, so as to perfect the right of the grantee to the land. *Ib.*
 14. PLEADING OF LACHES, ETC.—No formal plea of the statute of limitations, or of the special facts, is necessary to raise the defense of laches, neglect, or acquiescence, in a court of equity. *Lakin v. S. B. G. M. Co.*, 231.
 15. THE FOUR YEARS LIMITATION applies to this case, as stated in the eighth headnote, it not being, technically, a suit for "relief on the ground of fraud." *Ib.*
 16. STATUTE OF LIMITATIONS—CONSTRUCTIVE TRUST.—The statute does not begin to run against a *cestui que trust* in possession, until an ouster, whether the trust be express or implied. *Ib.*
 17. LACHES.—What equitable circumstance will defeat the defense of laches, considered. *Ib.*
 18. SUIT TO RESCIND CONTRACT ON THE GROUND OF FRAUD.—A court of equity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a material matter by such representation or conduct, to his injury or prejudice. *Seeley v. Reed*, 259.
 19. IDEM.—But when the facts are known to both parties and each acts on his own judgment, the court will not rescind the contract because it turns out that they or either of them were mistaken as to the legal effect of the facts or the rights or obligations of the parties thereunder; and particularly when such mistake can in no way injuriously

- affect the right of the party complaining, under the contract, or prevent him from obtaining and receiving all the benefit contemplated by it and to which he is entitled under it. *Ib.*
20. **REFORMATION OF POLICY.**—A demurrer to a bill for the reformation of a policy of insurance will be sustained, when it appears that by reason of the lapse of time no action can be maintained thereon for any cause, when reformed. A court will only decree the reformation of an instrument as a means of enabling a party thereto to assert or maintain some right thereunder. *Thompson v. Phoenix Ins. Co.*, 276.
21. **UNITED STATES COURTS OF EQUITY—STATE STATUTES ENLARGING EQUITABLE RIGHTS APPLICABLE TO.**—A state statute merely regulating procedure is not applicable to United States courts of equity. But, where a state statute enlarges a party's equitable rights, by creating a new remedy, under given circumstances, such equitable rights may be enforced in the United States circuit court. *W. F. & Co. v. Miner*, 280.
22. **THE SAME—CALIFORNIA STATUTE ENLARGING RIGHT OF INTERPLEADER.**—Section 386 of the California code of civil procedure, provides that "whenever conflicting claims are, or may be made, upon a person for, or relating to, personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead, and litigate their several claims among themselves. The action of interpleader may be maintained, and the applicant, or plaintiff, be discharged from liability to all or any of the conflicting claimants, *although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.*" *Held*, that such provision is not a mere regulation of procedure; that it creates a new right by enlarging the scope of the remedy; and that the right to interplead adverse claimants, so created, may be enforced in equity in the United States circuit court. *Ib.*
23. **THE SAME—INTERPLEADER UNDER ORIGINAL CHANCERY PRACTICE—CASE IN JUDGMENT.**—The defendant S. sold a mining claim to the defendant, the S. D. Co., for ten thousand dollars, and received in payment a check for that amount on the Bank of California. S. deposited the check with the complainant, who, thereupon paid him two thousand five hundred dollars, and issued to him a certificate of deposit for seven thousand five hundred dollars, payable to him "or order, on return of this certificate properly endorsed." By *mesne* assignments before maturity, the certificate came into the possession of defendant M., who claims to be the owner and holder thereof, but he is alleged not to be a holder in good faith. The S. D. Co., claims that in the sale of the mine, S. made certain false and fraudulent representations, by reason whereof they are entitled to rescind the sale, and recover back everything of value which they paid to S. The defendants, M. and S. D. Co., have each sued the complainant, the former to recover on the certificate of deposit, and the latter to enjoin its payment, until the determination of a suit, brought by them to rescind the sale. The complainant, thereupon brought the present suit in equity to compel the defendants to interplead, and to restrain the prosecution of the actions against them respecting the certificate, until the determination of the present suit. *Held*, that the case is a proper one for an interpleader, under section 386 of the code of procedure of California, and intimated that under the chancery practice, as it originally existed before the enlargement

of the scope of the remedy by said section, the complainant was entitled to interplead the defendants, because the same thing—the certificate of deposit—is claimed by both the S. D. Co. and M.; their claims being derived from a common source—the original transaction between the S. D. Co. and S.; and the complainant claiming no interest against, and having incurred no independent liability to, either of the defendants. *Ib.*

24. **PLEA IN ABATEMENT.**—The defendant pleaded in abatement that the plaintiff was not a citizen of the State of Nevada, as he alleged, but of California, to which the plaintiff replied; when the plea was duly set down for hearing, without any evidence being taken or offered in support thereof, and overruled, and the defendant allowed a day within which to answer to the merits: *Held*, that the plea was properly disposed of, and that the question of plaintiff's citizenship, for the purposes of the case, was thereby determined, unless a rehearing was asked for and allowed, and that the same defense could not be made again in the answer to the merits. *Sharon v. Hill*, 290.
25. **CASE IN JUDGMENT.**—In the fall of 1883 the defendant made a claim to be the wife of the plaintiff by virtue of an alleged secret declaration of marriage, purporting to have been signed by the parties on August 25, 1880, and a subsequent residence in a hotel belonging to the plaintiff and adjoining another in which he lived, from the latter part of September of the same year to the early part of December, 1881, and the receipt during this time of five hundred dollars a month from the plaintiff, after which, being expelled from her hotel by him, she lived about in San Francisco, and always went by her maiden name and passed for an unmarried woman; when on October 3, 1883, the plaintiff brought this suit to cancel and annul said alleged declaration as being false and forged, whereupon the defendant exhibited sundry letters purporting to be written to her by the plaintiff while she resided at his hotel, and addressed, "My Dear Wife;" *Held*, on the testimony of the parties, the experts, and the face of the alleged declaration and letters, that the same are false and forged—the former having been written by the defendant over a simulated signature of the plaintiff's, and the latter being a tracing made by her of a letter in ink written by the plaintiff, substituting in the process the word "Wife" in the address for "Miss Hill" or "Allie," and such substitution simply in the address of others written by him in pencil; and also that the contemporaneous conduct of the parties, and particularly that of the defendant, was altogether incompatible with the claim of marriage, or the existence of any such declaration or letters, and therefore the same are false and forged. *Ib.*
26. **RIGHT OF UNITED STATES TO VACATE PATENT TO LAND.**—Where the United States is under an obligation to make a title to a portion of the public lands, they have such an interest in the lands as entitles them to maintain a suit in equity to vacate a prior patent improperly issued by mistake to a party not entitled to it. *U. S. v. Curtner*, 412.
27. **PARTIES TO SUIT.**—Where lands have been improperly listed by the officers of the United States land department by mistake to the state of California, and the state has subsequently patented them to private parties, the state is not an indispensable party to a suit by the United States against the several patentees to annul such patents. Nor is the party entitled to the lands by right fully vested prior to such listing to the state an indispensable party. *Ib.*

-
28. **SAME—MULTIFARIOUSNESS.**—A bill in equity filed by the United States under circumstances set out in the bill, to vacate the patents to several parties of several distinct parcels of land, the several defendants having no joint interest in any portion of the land, depending upon the same facts and the same evidence, is not objectionable as being multifarious. *Ib.*
29. **INDISPENSABLE PARTIES.**—The owners of the land at the time of filing a bill in equity to vacate a United States patent are indispensable parties to the bill; and where it appears at the hearing, that the bill is filed, only, against parties who have no interest in the lands, it will be dismissed for want of necessary parties. *U. S. v. C. P. R. Co.*, 438.
30. **EXTERIOR BOUNDS OF MEXICAN GRANT.**—Where three exterior boundaries of a Mexican grant, and the quantity of land are designated, the fourth exterior boundary is found by running a line parallel to the opposite boundary, a sufficient distance therefrom, to include the quantity of land called for. *Ib.*
31. **SAME—MISTAKE.**—A court of equity will not correct a mutual, innocent, mistake from which no injury can result, when it would be inequitable to do so. It will not do a vain thing. *Ib.*
32. **CONCURRENT JURISDICTION—RECEIVER.**—The mere fact that a court has acquired jurisdiction of a suit between a grantor and grantee concerning their rights in certain property, and has taken possession of such property by the appointment of a receiver, does not prevent another court of concurrent jurisdiction from taking jurisdiction of a suit by a creditor of said grantor against said grantee, brought to set aside or postpones the conveyance of said property to the latter on the ground that it was made and received with intent to hinder and delay the plaintiff in the collection of his demand against the grantor; the relief sought may be granted without interfering with the possession of the receiver. *Hickox v. Elliot*, 624.
33. **ANSWER IN EQUITY.**—A defendant may answer an allegation in a bill that he has no knowledge, information or belief concerning the same, and the effect is to leave the matter to be proven by the plaintiff; but such answer is not equivalent, as evidence, to a denial of the fact alleged, nor can the defendant add a direct denial thereof to his answer that he has not even a belief on the subject. *Ib.*
34. **DEPOSITIONS—OBJECTION TO.**—A technical objection to evidence taken in a suit in equity must be made by motion to suppress before the cause is set for hearing. *Ib.*
35. **JUDGMENT—PROOF OF DEBT.**—A judgment creditor seeking to set aside conveyances anterior in date to his judgment, because made to hinder and delay him in the collection of his debt, may show by the proceedings in the case prior to the judgment, or other competent evidence, that his debt existed at or prior to the date of such conveyances. *Ib.*
36. **INSOLVENCY OF DEBTOR.**—It is not necessary to issue an execution on a judgment and have a return of *nulla bona* thereon, to show the insolvency of the judgment debtor; but the fact may be shown by any competent evidence that he has no property subject to the legal process of the court in which the judgment remains. *Ib.*
37. **FRAUDULENT CONVEYANCE.**—It is not necessary that the grantee in a deed, made by a debtor to hinder and delay his creditors, should have actual knowledge of the grantor's intent, to make it void; but it is sufficient if

he have knowledge of facts sufficient to put a prudent man on inquiry. *Ib.*

38. **CASE IN JUDGMENT.**—Conveyances made by an insolvent debtor to his brother, who was a large creditor, of all his property in the state, the value of the same being considerably in excess of the amount of the grantee's debt, without any settlement or agreement as to the values or cancellation or surrender of the evidences of debt held by the creditor, or any special change in the management of the property included in the conveyances, together with the fact that the grantor continued in the receipt of a large portion of the rents and profits of the property: *Held*, sufficient evidence of fraudulent intent of the grantor, and of the grantee's participation therein. *Ib.*
39. **DECREE FOR MONEY, WHEN NOT OTHERWISE SECURED WITHIN THE MEANING OF THE TWENTY-NINTH RULE.**—The plaintiff's debtor, being the equitable owner of certain real property, procured the same to be conveyed to his brother, with intent to thereby hinder and delay his creditors, and the grantee accepted the conveyance with knowledge of such intent; afterwards the plaintiff, having obtained a judgment against his debtor, filed a bill in this court to subject this property as an equitable asset in the hands of said grantee, to the satisfaction of his judgment, alleging the insolvency of the debtor, and obtained a decree thereon that the grantee pay the amount of the judgment within a certain time, and that in default of such payment the property in question be sold to satisfy the same; thereupon said grantee applied to have settled the amount of the *supersedeas* bond to be given by him on appeal from said decree, claiming that the decree was "otherwise secured" within the meaning of rule twenty-nine of the supreme court, and therefore the bond ought to be taken in an amount not more than sufficient to secure the payment of the costs: *Held*, that the money ascertained to be due the plaintiff by this decree is not "otherwise secured" within the meaning of said rule, and the amount of the bond is settled at seventy-five thousand dollars—the amount of the decree, with three years' interest thereon, and ten per centum damages for delay, with the costs of the appeal, being about fifty-five thousand dollars. *Ib.*
40. **PARTIES TO BILL OF REVIEW.**—Where the defendants in a decree were not necessary parties to the suit, one or more of them may maintain a bill of review to reverse the same, without making the co-defendants parties thereto. *King v. D. M. T. I. Co.*, 663.
41. **DECREE IN U. S. CIRCUIT COURT—BILL TO REVERSE.**—A decree of the U. S. circuit court will not be reversed on a bill of review therein, because in the meantime the state court has put a construction on a clause of the state constitution contrary to that of the circuit court in making said decree. *Ib.*

ESTOPPEL.

1. **ESTOPPEL BY ADJUDICATION.**—Parties to a legal proceeding in which any question is directly involved and determined are estopped to re-litigate the same question in any other proceeding, whether commenced before or after the one in which such adjudication took place, or in the same or another *forum*. *SAWYER, J. dubitante. Sharon v. Hill*, 291
2. **APPEAL FROM JUDGMENT IN CALIFORNIA.**—By the law of California the

- judgment of a court is not final until the case has been heard on appeal or the time for taking one has expired; and such judgment cannot be used as an estoppel against either party thereto, pending such appeal, which suspends its operation for all purposes. *Ib.*
3. JUDGMENT OF STATE COURT IN NATIONAL COURT.—The law of the state in which a judgment is given furnishes the rule by which its effect and operation are determined in the national courts. *Ib.*
 4. CONSENT, WHEN NOT AN ESTOPPEL.—The mere consent that a case pending on a motion to remand may be remanded, or that it may be assigned to a particular judge for trial, according to the organization and order of proceeding in the court where it is pending, does not have the effect to estop the consenting party from litigating any question involved in such case in another proceeding. *Ib.*
 5. RIGHT TO SUE IN NATIONAL COURTS.—Proceedings in a suit in the United States circuit court, will not be stayed, until a suit subsequently brought and pending in a state court between the same parties, involving some of the same questions, can be, finally, determined, for the purpose of giving effect to such final determination by way of estoppel. To do so, would be, in effect, to arbitrarily, deny the party entitled to sue in the circuit court, a remedy in that court. *Ib.*
 6. INCONSISTENT POSITIONS IN COURT.—A party who takes a position in the course of a litigation is estopped to act inconsistently therewith, so long as the same is unretracted, and this includes the case of one who having taken a judgment of this court against himself, to the supreme court on a writ of error, attempts, while said proceeding is still pending, to plead said judgment in bar of an action against himself by the plaintiff therein. *Hughes v. D. M. & T. I. Co.*, 546.
 7. JUDGMENT NOT SUSPENDED BY WRIT OF ERROR.—A writ of error is in the nature of a new suit to set aside or annul a judgment for error of law apparent on the face of the record, and pending the same the judgment is in full force and effect as a bar or an estoppel. *Ib.*
 8. ESTOPPEL BY CONTRACT.—In an action by an apparent corporation on a lease of its railway, to recover an installment of the rent reserved therein, the lessee is estopped to deny the lessor's corporate existence or power to make such contract. *O. R. Co. v. O. R. & Nav. Co.*, 564.
 9. CONTRADICTIONARY ALLEGATIONS.—When a denial of knowledge concerning a matter alleged in the complaint is followed by a direct averment necessarily implying such knowledge, either the denial may be stricken out as sham or the averment as redundant. *Ib.*
 10. JUDGMENT ON DEMURRER AN ESTOPPEL.—Judgment on a demurrer to a complaint is as conclusive and binding on the parties to the action as to all matters well pleaded therein, as though it was given on a verdict on an issue arising on a denial of the allegations of the complaint; and if final judgment is given for the plaintiff on a demurrer to an answer, such judgment is a conclusive determination between the parties of the questions involved in the defense made by such answer, and of the material matters stated in the complaint. *Ib.*
 11. JUDGMENT—ESTOPPEL OF.—A judgment is an estoppel in an action between the parties thereto as to any fact or matter determined thereby. *Ib.*
 12. ESTOPPEL BY JUDGMENT IN AN ACTION ON LEASE FOR RENT.—A covenant in a lease of a railway for a number of years, to pay the rent reserved therein in semi-annual installments is in the nature of a series of under-

takings or obligations assumed or incurred at the same time and under the same circumstances, and a judgment in an action to recover any one of these installments of rent is conclusive of the validity of the lease and the liability of the lessee thereunder, in any subsequent action thereon as to any matter or defense that might have been made to the first action.

Ib.

13. WRIT OF ERROR—EFFECT OF ON JUDGMENT.—A writ of error from the supreme to the circuit court is not a proceeding under the state code, but at common law, as modified by the revised statutes, and it does not have the effect, pending the proceeding, to suspend the operation of the judgment of the circuit court as a bar or an estoppel. *Ib.*

EVIDENCE.

1. PRODUCTION AND INSPECTION OF PAPERS.—Where a party to a suit for the annulment of an alleged false writing willfully refuses to produce the same and submit it to the tests and examination necessary and convenient to enable the court to determine the question of its falsity, the legal inference is that such production and examination would tend to prove the falsity of the paper; and the same inference may be made from a like refusal to produce and similarly submit any other paper or item of evidence bearing on the question. *Sharon v. Hull*, 291.
2. CONTRADICTION OF WITNESSES.—The contradiction by one witness of the statement of another does not necessarily impeach or affect the credibility of either; for the contradiction may arise from mistake or other cause consistent with the integrity of both witnesses. *Ib.*
3. PROOF OF FOREIGN STATUTE.—The testimony of a credible witness, whether a lawyer or a layman, with reasonable means of information, to the effect that a volume containing what purports to be a statute of a foreign country is commonly received in the business and courts of such country, as such, is competent and sufficient proof of the existence of such statute. *D. M. & T. I. Co. v. Cooper*, 501.
4. CERTIFICATE OF INCORPORATION.—A certificate of incorporation under section 18 of "The Companies Act" of Great Britain, may be issued in duplicate and at any length of time after the memorandum of association is registered in the office of the registrar. *Ib.*
5. IDEM—PROOF OF.—Such certificate when delivered to the corporation is a private writing in private custody, and cannot be proved by an examined copy; the original must be produced if in existence. *Ib.*
6. JUDGMENT—PROOF OF DEBT.—A judgment creditor seeking to set aside conveyances anterior in date to his judgment, because made to hinder and delay him in the collection of his debt, may show by the proceedings in the case prior to the judgment, or other competent evidence, that his debt existed at or prior to the date of such conveyances. *Hickox v. Elliot*, 624.
7. INSOLVENCY OF DEBTOR.—It is not necessary to issue an execution on a judgment and have a return of *nulla bona* thereon, to show the insolvency of the judgment debtor; but the fact may be shown by any competent evidence that he has no property subject to the legal process of the court in which the judgment remains. *Ib.*

See CONTRACT.

EXTRADITION.

1. **WARRANT OF EXTRADITION—INTERPRETATION OF.**—A warrant of extradition allowed by the Dominion government under the tenth article of the treaty of 1842 with Great Britain, recited that the party was accused of the crime of "forgery," and had been committed for extradition thereon, without saying what forgery: *Held*, that resort might be had to the proceedings before the committing magistrate and his report on which the warrant issued, to ascertain what and how many forgeries the extradition was intended to apply to or include. *Ex parte Hibbs*, 452.
2. **FOR WHAT CRIME AN EXTRADITED PERSON MAY BE TRIED.**—The treaty aforesaid is not only a contract between the government of Great Britain and the United States, but it is also the law of this land; and a person extradited under it cannot be detained or tried here for a crime, unless enumerated therein and included in the warrant of extradition; and he may, if occasion require, invoke the treaty in any judicial proceeding as a protection against such detention or trial. *Ib*.

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW.

FRAUD.

1. **INNOCENT PURCHASER.**—Semble, that a purchaser in good faith and for a valuable consideration, from a pre-emptor, of the land included in the latter's certificate of purchase, takes the same purged of any fraud which might have been committed in obtaining said certificate. *Smith v. Ewing*, 56.
2. **CONCLUSIVENESS OF PATENT IN CASES OF FRAUD IN PROCEEDINGS BEFORE LAND OFFICE.**—The doctrine of the conclusiveness of judgments and decrees of courts as between those who are parties to the litigation, is not applicable to the United States in respect to proceedings before the land officers for obtaining patents for the public lands, in cases where fraud is practiced and where there was no contest, and the proceedings were wholly *ex parte*. *U. S. v. Rose*, 83.
3. **FRAUD IN OBTAINING PATENT.**—Where a patent has been issued upon false and fraudulent representations made by the patentee to the land officers, supported by perjury, there having been no contest and the proceedings having been wholly *ex parte*, a court of equity will annul the patent, at the suit of the United States. *Ib*.
4. **SUIT TO RESCIND CONTRACT ON THE GROUND OF FRAUD.**—A court of equity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a material matter by such representation or conduct, to his injury or prejudice. *Seeley v. Reed*, 259.
5. **IDEM**—But when the facts are known to both parties and each acts on his own judgment, the court will not rescind the contract because it turns out that they or either of them were mistaken as to the legal effect of the facts or the rights or obligations of the parties thereunder; and particularly when such mistake can in no way injuriously affect the right of the party complaining, under the contract, or prevent him from obtaining and receiving all the benefit contemplated by it and to which he is entitled under it. *Ib*.

FRAUDULENT CONVEYANCE.

1. **FRAUDULENT CONVEYANCE.**—It is not necessary that the grantee in a deed made by a debtor to hinder and delay his creditors, should have actual knowledge of the grantor's intent, to make it void; but it is sufficient he have knowledge of facts sufficient to put a prudent man on inquiry.
 • *Hickox v. Elliot*, 624.
2. **CASE IN JUDGMENT.**—Conveyances made by an insolvent debtor to his brother, who was a large creditor, of all his property in the state, the value of the same being considerably in excess of the amount of the grantee's debt, without any settlement or agreement as to the value, cancellation or surrender of the evidences of debt held by the creditor or any special change in the management of the property included in the conveyances, together with the fact that the grantor continued in the receipt of a large portion of the rents and profits of the property *Held*, sufficient evidence of fraudulent intent of the grantor, and of the grantee's participation therein. *Ib*.
3. **DECREE FOR MONEY, WHEN NOT OTHERWISE SECURED WITHIN THE MEANING OF THE TWENTY-NINTH RULE.**—The plaintiff's debtor, being the equitable owner of certain real property, procured the same to be conveyed to his brother, with intent to thereby hinder and delay his creditors, and the grantee accepted the conveyance with knowledge of such intent; afterwards the plaintiff, having obtained a judgment against his debtor, filed a bill in this court to subject this property as an equitable asset in the hands of said grantee, to the satisfaction of his judgment, alleging the insolvency of the debtor, and obtained a decree thereon that the grantee pay the amount of the judgment within a certain time, and that in default of such payment the property in question be sold to satisfy the same; thereupon said grantee applied to have settled the amount of the *supersedeas* bond to be given by him on appeal from said decree, claiming that the decree was "otherwise secured" within the meaning of rule twenty-nine of the supreme court, and therefore the bond ought to be taken in an amount not more than sufficient to secure the payment of the costs: *Held*, that the money ascertained to be due the plaintiff by this decree is not "otherwise secured" within the meaning of said rule, and the amount of the bond is settled at seventy-five thousand dollars—the amount of the decree, with three years' interest thereon, and ten per centum damages for delay, with the costs of the appeal, being about fifty-five thousand dollars. *Ib*.

HABEAS CORPUS.

1. **COURTS MARTIAL—JURISDICTION OF CIVIL COURTS—HABEAS CORPUS.**—Within the sphere of their jurisdiction, the judgment and sentences of courts martial are as final and conclusive as those of civil tribunals of last resort, and the only authority of the civil courts is to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, they cannot be interfered with, no matter what errors may be committed in the exercise of their lawful jurisdiction. *In re Mc Vey*, 25.
2. **STATE AND CIRCUIT COURTS.**—The supreme court of the state, and the United States circuit court have concurrent original jurisdiction on *habeas corpus* to inquire into the constitutionality and validity of a city ordinance

alleged to have been passed in contravention of the fourteenth amendment to the constitution of the United States. But the circuit court should not overrule the solemn judgment of the supreme court of the state upon this question where there is reasonable ground for doubt. In such cases the question should be referred to the supreme court of the United States for an authoritative decision of the doubtful point. *Wyo. Lec.*, 429.

3. **HABEAS CORPUS FOR THE DELIVERANCE OF PERSON HELD UNDER AUTHORITY OF A STATE.**—The circuit and district courts of the United States have authority to discharge a person by *habeas corpus* from imprisonment under the authority of a state, contrary to the constitution or a law or treaty of the United States; but when such person is in custody only on the charge of an offense against the laws of the state, the court may in its discretion refuse to discharge him before trial or even afterward, and until the case has been heard in the state court of last resort. *In re Hanson*, 657.
4. **POWER TO REGULATE COMMERCE.**—*Quere*: Does the power of congress over commerce include commerce between a state of the Union and a territory thereof? *Ib.*

See CHINESE; CONSTITUTIONAL LAW.

INDIANS AND INDIAN AFFAIRS.

1. **INDIAN SAWMILL.**—Lumber made at the sawmill on the Grand Ronde Indian reservation, is in fact the "property" of the Indians thereon, and not that of the United States within the purview of section 3618 of the revised statutes; and the agent, subject to the instructions of the commissioner of Indian affairs, may dispose of any portion of the same and apply the proceeds to the support of the mill or otherwise for the benefit of the Indians, without reference to section 3617 of the revised statutes, requiring money received for the use of the United States to be deposited to its credit. *U. S. v. Sinnott*, 398.
2. **DOUBLE PAYMENT OF SALARY.**—The superintendent of Indian affairs in Oregon returned to the department two vouchers for the payment by him of the salary of the agent of the Grand Ronde reservation for the second quarter of 1873, each being marked "triplicate," from which the accounting officers assumed that the salary was paid twice, and charged the agent with the amount of such payments in the settlement of his official accounts: *Held* (1), That on the face of the transaction it was apparent that these two papers were but parts of one voucher taken in triplicate, and that there was but one payment; and (2), that if there had been two payments, the agent, although liable for the excess, as an individual, as for money had and received to the use of the United States, was not liable therefor on his bond. *Ib.*
3. **MONEY PAID BY AGENT WITHOUT AUTHORITY.**—The defendant, Sinnott, employed a person on the reservation aforesaid, as "superintendent of farms and mills," and in reporting the fact to the commissioner, said that he did so at the instance of "some political friends," but there was really no necessity for the employment, and advised that it be disapproved, which was done; but the agent continued the person in such employment and paid him therefor, and on settlement of his accounts at the treasury, fifteen hundred dollars thereof was disallowed: *Held*, That

- the payments being not only without authority, but contrary thereto, were illegal, and the agent and his sureties are liable therefor. *Ib.*
4. **ALASKA.**—NOT "INDIAN COUNTRY."—Alaska is not "Indian country," in the sense in which that phrase is used in the intercourse act of 1834 and the revised statute. *Kie v. U. S.*, 579.
 5. **IDEM.**—JURISDICTION OF DISTRICT COURT THEREIN.—The district court of Alaska has jurisdiction under section 5339 and 5341 of the revised statutes, to try and punish any inhabitant of the district for the crime of murder or manslaughter committed by the killing of any human being therein; but the law of Oregon defining the crime of murder or manslaughter, and prescribing the punishment therefor, is not in force in Alaska. *Ib.*
 6. **ERRONEOUS SENTENCE.**—The plaintiff in error being convicted of manslaughter, was sentenced to punishment therefor under the law of Oregon instead of the act of 1875 (18 Stats. 473), whereby his imprisonment was authorized for twenty days in excess of the punishment allowed by said act: *Held*, that the judgment was erroneous, and the same was reversed, with direction to have the plaintiff in error sentenced according to law. *Ib.*
 7. **JURY PRESUMED TO HAVE BEEN LEGALLY SELECTED AND DRAWN.**—It appeared from the record that when the case was called for trial a jury came who were duly impaneled and sworn: *Held*, that in the absence of anything to the contrary, the presumption is, that the jury were selected and drawn according to law. *Ib.*
 8. **SELECTION AND QUALIFICATION OF JURORS IN ALASKA.**—Jurors to serve in the district court of Alaska must be selected in the manner provided in section 2 of the act of June 30, 1879 (21 Stats. 43), and have the qualifications prescribed by the law of Oregon. *Ib.*
 9. **PRESENCE OF THE DEFENDANT.**—In the trial of a criminal action involving corporal punishment, the record should show that the defendant was present; but it is sufficient if his presence may be fairly inferred from the whole record, without being explicitly stated at every stage of the procedure. *Ib.*

INJUNCTION.

1. **INJUNCTION AGAINST UNLAWFUL PRESENTATION OF OPERA, WHEN ISSUED.**—The owner of a literary work, such as an opera, not protected by a copyright, is entitled to an injunction against its unauthorized presentation, upon giving approved security. In such case the right to recover damages for the unlawful production of the opera, is not an adequate remedy. *Goldmark v. Kretting*, 215.
2. **THE SAME.**—PRELIMINARY INJUNCTION—ADDITIONAL SECURITY MAY BE ORDERED.—Where a preliminary injunction is granted, upon complainants giving a bond, if counsel for the respondents have not had an opportunity to be present at the approval of the bond, the court, sitting as a court of equity, has power, upon petition, promptly made, or affidavit, showing the sureties to be insufficient, and notice to the other side, without regard to other proceedings, at any proper stage of the case, to require an additional bond to be given, as a condition of the continuance of the injunction. Such application should be promptly made, otherwise the right to object will be deemed waived. *Ib.*

3. **THE SAME—RIGHT TO INJUNCTION WHEN NOT LOST BY FAILURE TO FURNISH SECURITY IN TIME.**—The complainants, as owners, filed a bill to restrain the defendants from producing the opera of "Nanon." Such opera had never been copyrighted. An order to show cause why an injunction should not be granted, was issued, returnable on a day fixed. After several delays, no cause having been shown against it, an injunction was issued, on condition that the complainants give bond in the sum of ten thousand dollars. The bond offered being deemed insufficient by the court, the injunction was dissolved upon the defendants filing an indemnity bond. The complainants thereupon moved to set aside the order dissolving the injunction, at the same time offering a certified check for ten thousand dollars, or an equal amount of coin, as security. *Held*, that such order should be granted; that complainants' right to an injunction was not lost by reason of their failure to furnish a sufficient bond in the first instance. *Ib.*
4. **DISTINCTIONS BETWEEN THE PRESENT CASE AND CASES INVOLVING THE INFRINGEMENTS OF PATENTS AND COPYRIGHTS,** so far as the complainants' right to a preliminary injunction is concerned, stated and discussed. *Ib.*

INSTRUCTIONS TO JURY.

See NON-SUIT.

INSURANCE.

1. **LIMITATION ON RIGHT TO SUE ON A POLICY OF INSURANCE.**—A policy of insurance contained in effect this stipulation: 1. No action shall be commenced hereon to recover for a loss hereunder until the amount thereof is ascertained by agreement or arbitration; and, 2. No such action shall be maintained unless commenced within one year after the date of the fire from which the loss occurred. *Held*: That unless the assured was prevented by the action or non-action of the insurer, in the matter of ascertaining the amount of the loss, he must commence his action therefor within the time specified in the stipulation. *Thompson v. Phoenix Ins. Co.*, 276.
2. **REFORMATION OF POLICY.**—A demurrer to a bill for the reformation of a policy of insurance will be sustained, when it appears that by reason of the lapse of time no action can be maintained thereon for any cause, when reformed. A court will only decree the reformation of an instrument as a means of enabling a party thereto to assert or maintain some right thereunder. *Ib.*

INTERPLEADER.

1. **UNITED STATES COURTES OF EQUITY—STATE STATUTES ENLARGING EQUITABLE RIGHTS APPLICABLE TO.**—A state statute merely regulating procedure is not applicable to United States courts of equity. But, where a state statute enlarges a party's equitable rights, by creating a new remedy, under given circumstances, such equitable rights may be enforced in the United States circuit court. *W. F. & Co., v. Miner*, 280.
2. **THE SAME—CALIFORNIA STATUTE ENLARGING RIGHT OF INTERPLEADER.**—Section 386 of the California code of civil procedure, provides that "whenever conflicting claims are, or may be made, upon a person for, or relating to, personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the con-

flicting claimants to compel them to interplead, and litigate their several claims among themselves. The action of interpleader may be maintained, and the applicant, or plaintiff, be discharged from liability to all or any of the conflicting claimants, *although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.*" *Held*, that such provision is not a mere regulation of procedure; that it creates a new right by enlarging the scope of the remedy; and that the right to interplead adverse claimants, so created, may be enforced in equity in the United States circuit court. *Ib.*

3. **THE SAME—INTERPLEADER UNDER ORIGINAL CHANCERY PRACTICE—CASE IN JUDGMENT.**—The defendant S. sold a mining claim to the defendant, the S. D. Co., for ten thousand dollars, and received in payment a check for that amount on the Bank of California. S. deposited the check with the complainant, who, thereupon paid him two thousand five hundred dollars, and issued to him a certificate of deposit for seven thousand five hundred dollars, payable to him "or order, on return of this certificate properly endorsed." By *mesne* assignments before maturity, the certificate came into the possession of defendant M., who claims to be the owner and holder thereof, but he is alleged not to be a holder in good faith. The S. D. Co., claims that in the sale of the mine, S. made certain false and fraudulent representations, by reason whereof they are entitled to rescind the sale, and recover back everything of value which they paid to S. The defendants, M. and S. D. Co., have each sued the complainant, the former to recover on the certificate of deposit, and the latter to enjoin its payment, until the determination of a suit, brought by them to rescind the sale. The complainant, thereupon brought the present suit in equity to compel the defendants to interplead, and to restrain the prosecution of the actions against them respecting the certificate, until the determination of the present suit. *Held*, that the case is a proper one for an interpleader, under section 386 of the code of procedure of California, and intimated that under the chancery practice, as it originally existed before the enlargement of the scope of the remedy by said section, the complainant was entitled to interplead the defendants, because the same thing—the certificate of deposit—is claimed by both the S. D. Co. and M.; their claims being derived from a common source—the original transaction between the S. D. Co. and S.; and the complainant claiming no interest against, and having incurred no independent liability to, either of the defendants. *Ib.*

JUDGMENT.

See ESTOPPEL.

JURISDICTION.

1. **THE JURISDICTION OF THE UNITED STATES COURTS** of offenses committed in places in California purchased by the United States, by the consent of the legislature of the state, for a custom house, and other needful buildings, and used for such buildings, is exclusive. *Sharon v. Hill*, 122.
2. **DEADLY WEAPONS—CONTEMPT AND OFFENSES.**—The drawing of a pistol, and threatening the lives of counsel, in the presence of an examiner in chancery while taking testimony in an equity case, pending in the United States circuit court, in the chambers of the judge adjoining the court-

- room, situate upon land thus under the exclusive jurisdiction of the United States, is both a contempt of court; punishable as such, and an offense under the statutes of the United States, punishable on indictment. *Ib.*
3. CONTEMPT OF COURT—OFFENSES UNDER THE STATUTE.—Where the same acts constitute offenses against the United States, punishable upon information or indictment, and at the same time a contempt of court, punishable as such, and there is no special end, in the administration of justice, to be accomplished by proceeding, summarily, on process for contempt, the court may waive the process for contempt, and leave the government to proceed to punish the offense under the statute. *Ib.*
 4. ARMED ATTORNEYS.—The going into court, by members of the bar, armed with deadly weapons, characterized as not only a contempt of court, but also *professional misconduct*, that ought to be punished by suspension from practice or disbarment. *Ib.*
 5. JURISDICTION TO ENJOIN PROCEEDINGS IN STATE COURT.—The United States circuit court has no authority to restrain the chief of police of San Francisco from serving warrants of arrest issued by the police court upon criminal charges for violating city ordinances, alleged to have been passed in contravention of the fourteenth amendment of the constitution of the United States, and of the stipulations of our treaty with China. *Yick Wo v. Crowley*, 422.
 6. SECTION 720 OF THE REVISED STATUTES prohibits the issue of injunctions to restrain proceedings in the state courts. *Ib.*
 7. STATE AND CIRCUIT COURTS.—The supreme court of the state, and the United States circuit court have concurrent original jurisdiction on *habeas corpus* to inquire into the constitutionality and validity of a city ordinance alleged to have been passed in contravention of the fourteenth amendment to the constitution of the United States. But the circuit court should not overrule the solemn judgment of the supreme court of the state upon this question where there is reasonable grounds for doubt. In such cases the question shall be referred to the supreme court of the United States for an authoritative decision of the doubtful point. *Wo Lee*, 429.
 8. SAME—LAUNDRY ORDINANCE—CONSTITUTIONAL LAW.—On this ground the circuit court declined to hold a city ordinance invalid, as being in contravention of the fourteenth amendment to the constitution of the United States, which ordinance made it an offense "for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." *Ib.*
 9. COURTS—JURISDICTION—STATE AND NATIONAL COURTS—CONSTRUCTION OF STATUTE.—A question involving the right to public land claimed by one of the parties to have been pre-empted by him under a statute of the United States, does not fall within the jurisdiction of the circuit court unless it actually involves the construction of a United States statute. *Theurkauf v. Ireland*, 512.
 10. MANDAMUS—JURISDICTION OF THE CIRCUIT COURT—WHEN GIVEN.—The United States circuit court has no jurisdiction to entertain an application for a *mandamus*, originally presented therein, except as ancillary to some other proceeding establishing the demand, and reducing it to judg-

ment, and in the nature of process for executing such judgment. *Rosenbaum v. Board of Supervisors*, 620.

11. **SAME—JURISDICTION—REMOVAL FROM STATE TO UNITED STATES COURTS—CONSTRUCTION OF ACT OF CONGRESS OF 1875, SECTIONS 1, 2, 716.**—Jurisdiction of a writ of *mandamus* cannot be conferred upon the United States circuit court by commencing the proceeding in the state court, and then removing it to the United States circuit court, under the act of congress of 1875. *Ib.*
12. **SAME—WHAT IS—ACT OF CONGRESS OF 1875, SECTIONS 1, 2.**—A *mandamus* is not “a suit of a civil nature, at law or in equity,” within the meaning of the act of congress of 1875. *Ib.*
13. **SAME—CODE CALIFORNIA, SECTIONS 1034, 1086.**—Under the California code a *mandamus* is not regarded as an action at law or a suit in equity, in the *ordinary* sense in which those terms are used; but as a special proceeding to afford a remedy where there is not a plain, speedy, and adequate remedy “in the *ordinary* course of law.” *Ib.*
14. **CONCURRENT JURISDICTION—RECEIVER.**—The mere fact that a court has acquired jurisdiction of a suit between a grantor and grantee concerning the rights in certain property, and has taken possession of such property by the appointment of a receiver, does not prevent another court of concurrent jurisdiction from taking jurisdiction of a suit by a creditor of said grantor against said grantee, brought to set aside or postpone the conveyance of said property to the latter on the ground that it was made and received with intent to hinder and delay the plaintiff in the collection of his demand against the grantor; the relief sought may be granted without interfering with the possession of the receiver. *Hickox v. Elliott*, 624.

See BRIDGE; CONTEMPT; HABEAS CORPUS; INDIAN COUNTRY; MINES AND MINING.

JURY.

1. **JURY PRESUMED TO HAVE BEEN LEGALLY SELECTED AND DRAWN.**—It appeared from the record that when the case was called for trial a jury came who were duly impaneled and sworn: *Held*, that in the absence of anything to the contrary, the presumption is, that the jury were selected and drawn according to law. *Kie v. U. S.* 579.
2. **SELECTION AND QUALIFICATION OF JURORS IN ALASKA.**—Jurors to serve in the district court of Alaska must be selected in the manner provided in section 2 of the act of June 30, 1879 (21 Stats. 43), and have the qualifications prescribed by the law of Oregon. *Ib.*

See LAUNDRIES.

See CHINESE.

LICENSES.

See TAXES.

LIMITATIONS, STATUTE OF.

1. **STATUTE OF LIMITATIONS—RESIGNATION OF SUPERVISORS**, to avoid service of summons in a suit, does not prevent, or intercept the running of the statute of limitations. *Nash v. El Dorado Co.*, 86.

2. **LIMITATIONS—COMMENCEMENT OF SUIT.**—A suit is commenced within the meaning of the statute of limitations by the filing of a complaint, without service of summons. *Ib.*
3. **COUPONS—LIMITATIONS.**—A right of action accrues upon coupons at the moment they fall due, and the statute of limitations commences to run upon coupons from their maturity. *Ib.*
4. **INTEREST ON COUPONS.**—Under section 1917, civil code of California, where there is no special provision as to interest upon bonds and coupons, both the bonds and coupons bear interest, after maturity, at the ordinary legal rate, whether the coupons are detached from the bonds or not. *Ib.*
5. **SPECIAL LIMITATION ACTS CONSTITUTIONAL.**—The legislature of the State of California has the power to pass special acts of limitation, applicable to a particular county indebtedness. *Ib.*
6. **STATUTE OF LIMITATIONS AS TO BONDS AND COUPONS.**—Coupons are regarded as part of the bonds, and the same limitation applies to coupons as that applicable to the bonds, of which they constitute a part. If an action is barred on a bond in four years after it matures, the statute runs four years on the coupons attached to the bond after the coupons become due; but the statute commences to run on the bond from its maturity, and upon the coupon from the time it becomes payable. *Ib.*
7. **PLEADING OF LACHES, ETC.**—No formal plea of the statute of limitations, or of the special facts is necessary to raise the defense of laches, neglect, or acquiescence, in a court of equity. *Lakin v. S. B. M. Co.* 231.
8. **THE FOUR YEARS, LIMITATION** applies to this case, as stated in the eighth headnote, it not being, technically, a suit for "relief on the ground of fraud." *Ib.*
9. **STATUTE OF LIMITATIONS—CONSTRUCTIVE TRUST.**—The statute does not begin to run against a *cestui que trust* in possession, until an ouster, whether the trust be express or implied. *Ib.*
10. **LIMITATION ON RIGHT TO SUE ON A POLICY OF INSURANCE.**—A policy of insurance contained in effect this stipulation: 1. No action shall be commenced hereon to recover for a loss hereunder until the amount thereof is ascertained by agreement or arbitration; and, 2. No such action shall be maintained unless commenced within one year after the date of the fire from which the loss occurred: *Held*, That unless the assured was prevented by the action or non-action of the insurer, in the matter of ascertaining the amount of the loss, he must commence his action therefor within the time specified in the stipulation. *Thompson v. Phoenix Ins. Co.* 276.

MANDAMUS.

1. **MANDAMUS—JURISDICTION OF THE CIRCUIT COURT—WHEN GIVEN**—The United States circuit court has no jurisdiction to entertain an application for a *mandamus*, originally presented therein, except as ancillary to some other proceeding establishing the demand, and reducing it to judgment, and in the nature of process for executing such judgment. *Rosenbaum v. Bd. Sup.* 620.
2. **SAME—JURISDICTION—REMOVAL FROM STATE TO UNITED STATES COURTS—CONSTRUCTION OF ACT OF CONGRESS OF 1875, SECTIONS 1, 2, 716.**—Jurisdiction of a writ of *mandamus*, cannot be conferred upon the United States circuit court by commencing the proceeding in the state court,

and then removing it to the United States circuit court, under the act of congress of 1875. *Ib.*

3. **SAME—WHAT IS—ACT ON CONGRESS ON 1875, SECTIONS 1, 2.**—A *mandamus* is not "a suit of a civil nature, at law or in equity," within the meaning of the act of congress of 1875. *Ib.*
4. **SAME—CODE CALIFORNIA SECTIONS 1034, 1086.**—Under the California code a *mandamus* is not regarded as an action at law or a suit in equity, in the *ordinary* sense in which those terms are used; but as a special proceeding to afford a remedy where there is not a plain, speedy, and adequate remedy "in the *ordinary* course of law." *Ib.*

MEXICAN GRANTS.

1. **RAILROAD LAND GRANT WITHIN MEXICAN GRANTS.**—Under the act of 1866 (14 Stats. 239), granting land to aid in the construction of the California and Oregon railroad, lands outside the forty mile limit of the specific grant, and within the exterior limits of an alleged Mexican grant, are subject to selection in lieu of the alternate odd sections otherwise disposed of, at the time of the definite location of the road, situated within the forty-mile limit, at any time after the final rejection of such Mexican grant. *U. S. v. C. P. R. Co.* 438.
2. **LIEU LANDS.**—The grant does not attach to the odd sections of lands outside the forty-mile limit of the specific grant, until the selection is, actually, made by the railroad company under the direction of the secretary of the interior, in lieu of lands otherwise disposed of within said limit. *Ib.*
3. **SAME.**—If at the time such selection of outside lieu lands is made, a claim under a Mexican grant embracing the lands selected within its exterior limits, has been finally rejected, the lands have ceased to be *sub judice*, and are subject to selection. *Ib.*
4. **PREMATURE SELECTION.**—Although such lieu lands have been selected and patented, prematurely, before the final rejection of the grant, yet, in a suit by the United States to vacate the selection and patent, commenced long after the final rejection of the grant, on the ground that it was issued by mistake, will not be sustained, where it does not appear, that any private party has acquired any interest in the lands so selected, or that the government has become subject to any obligation in relation to said land, and has sustained no injury by reason of such premature selection, and patent. *Ib.*

MINES AND MINING.

1. **CONTEMPT—VIOLATION OF INJUNCTION—MINING DEBRIS.**—Running a tunnel twenty-five hundred feet into respondent's mine, and washing the earth removed therefrom, and washing the earth from caves of the banks, occurring from time to time, by a hydraulic monitor, and other washings of earth and debris by water flowing over the high banks of the mine into a tributary of the Yuba river, constitute a violation of the injunction perpetually restraining defendants "from discharging or dumping into the Yuba river or its tributaries any of the tailings, boulders, cobble stones, gravel, sand, clay, debris, or other refuse matter," from any of their mines; and a contempt. A fine of fifteen hundred dollars imposed as a punishment for the contempt. *In re N. Bloom. M. Co.*, 590.

2. **INJUNCTION—MODIFICATION OF ORDER—SERVICE OF PAPERS.**—The rules and practice of the circuit court of the ninth circuit, on an order to show cause why an injunction should not be modified, require copies of all the moving papers to be served with the order; and mere supporting affidavits cannot be filed in opposition to the affidavits showing cause, where the latter only controvert the moving affidavits, and do not set up any new affirmative matter constituting a defense. *Hardt v. Liberty Hill C. M. & W. Co.*, 611.
3. **MINES AND MINING CLAIMS—MINING DEBRIS—IMPOUNDING DAMS.**—No dam for impounding mining debris, erected in mountain rivers, should be held sufficient to protect riparian and other proprietors below, where the determination of their sufficiency rests upon the opinions of engineers, apparently equally intelligent, and those opinions are at variance; nor upon any evidence not of the most unquestionable and satisfactory character. *Ib.*
4. **SAME.**—It is not the province of the court to speculate upon the sufficiency of means adopted by trespassers for the protection of the parties trespassing upon, or the sufficiency of such means to resist the action of the forces of nature, where the data for a correct determination are uncertain and unreliable, and where an error in judgment is liable to work great injury to the latter. *Ib.*

MINING CLAIM.

1. **ABANDONMENT**, of a mining claim, is a voluntary act, on the part of the owner, and when relied on, as a defense, must be proved by the party alleging it. *Lakin v. S. B. G. M. Co.*, 231.
2. **FORFEITURE.**—A party who has forfeited a mining claim by failing to work it as required by law, may continue his right by resuming work, at any time, before any other party has re-located on the ground of forfeiture. *Ib.*
3. **PATENT SURREPTITIOUSLY OBTAINED.**—T. and McG., being owners of a mining claim, had a survey made, applied for a patent, published the notice as required by the statute, and no adverse claims having been filed, their right to a patent became perfected. Afterward the M. Co. claiming, without right, to be successor in interest to T. and McG., surreptitiously, procured a patent to itself on the application of T. and McG. *Held.*—That the M. Co. held the title so obtained, charged with a constructive trust in favor of T. and McG., and that it did not lie in the mouth of the M. Co., to say, that T. and McG., have lost their right to the claim by forfeiture, or otherwise. *Ib.*

MONEY.

1. **MONEY RECEIVED ON ERRONEOUS JUDGMENT.**—Where money is received on an erroneous judgment by a party thereto, the law, on a reversal of the same, raises an obligation against such party, to restore the amount, which obligation may be enforced by an action, as for money had and received to the use of the plaintiff therein. *Crane v. Runey*, 418.
2. **CASE IN JUDGMENT.**—In a suit to enforce a mechanics' lien, the parties hereto with others having liens on the same property were made defendants, and the court by its decree directing the sale of the property and the distribution of the proceeds among the parties, postponed the

payment of the plaintiff's claim to that of the defendant's, which portion of the decree, the supreme court, on appeal taken after the confirmation of the sale and the distribution of the proceeds, reversed, and also ordered a resale: *Held*, that on the reversal of the erroneous decree, the defendant in contemplation of the law held the money wrongly received by him thereon for the use and benefit of the plaintiff, to whom it should have been originally adjudged and paid, and that he might maintain an action to recover the same as for money had and received to his use; and the order of resale did not limit or affect his right in this particular. *Ib.*

MONTGOMERY AVENUE BONDS.

1. **FEDERAL COURTS FOLLOW STATE COURTS IN CONSTRUING STATE STATUTE**, unless such construction conflicts with or impairs the efficiency of some principle of the federal constitution or of a federal statute, or a rule of commercial or general law. *Liebman v. City and County S. F.*, 147.
2. **THE CONSTRUCTION OF THE "MONTGOMERY AVENUE ACT"** of April 1, 1872, of the California legislature, by the state supreme court in *Mulligan v. Smith*, 59 Cal. 206, approved and followed. *Ib.*
3. **THE PETITION OF PROPERTY OWNERS FOR OPENING MONTGOMERY AVENUE** in San Francisco, provided for in the California statute of April 1, 1872, was essential to the validity of the proceedings, including the issue of the bonds authorized by the act, and the sufficiency of the petition must be affirmatively shown to maintain an action on the bonds, unless it can be conclusively presumed from the character of the bonds or their recitals. *Ib.*
4. **RECITALS IN MUNICIPAL BONDS OF COMPLIANCE WITH THE STATUTE** authorizing their issue, estop the obligors from denying such compliance, as against *bona fide* purchasers of the bonds, for value, and without notice of any defect in the proceedings. *Ib.*
5. **RECITALS IN MUNICIPAL BONDS MUST CLEARLY IMPORT COMPLIANCE** with the statute authorizing them, in order to estop the obligors from showing that they were issued without authority of law. *Ib.*
6. **THE MONTGOMERY AVENUE BONDS CONTAIN NO SUFFICIENT RECITALS** of compliance with the statute under which they were issued, the clause relied upon as a recital being a mere caption, and, at most, importing only that: "In conformity with the act, the treasurer will pay;" that is, that he will pay out of the special fund provided for by the act. *Ib.*
7. **A CITY IS NOT ESTOPPED BY RECITALS IN BONDS NOT ISSUED BY IT**, nor under its authority, but by, and under the name and seal of, a distinct corporation composed of officers of the city, but acting independently of it, created by a special statute providing for the opening of a street in such city and deriving its powers wholly from the statute. Hence, the city and county of San Francisco is not bound by the recitals, if any, contained in the "Montgomery avenue bonds" issued by the board of public works, under the authority of the act of April 1, 1872. *Ib.*
8. **THE PARTY ACTUALLY LIABLE ON A BOND MUST HAVE HIS DAY** in court, in person, or by his representative, before there can be any binding judgment determining its validity as against him or his property. *Ib.*
9. **A CITY CANNOT BE SUED ON BONDS NOT ISSUED BY IT**, and upon which the statute authorizing their issue declares that it shall not be liable, merely for the purpose of establishing their validity, so as to obtain a mandamus

to compel the levy of the tax provided by the statute for their payment; as where a special statute providing for the opening of a street in a city created a board, to be composed of certain city officers and known as the board of public works, and authorized the board to issue bonds to pay for the lands taken, the bonds to be paid out of a special tax upon the property benefited by the street, and declared that the city should not be liable on the bonds "in any event whatever," and that the holders should take the bonds on that condition, and the bonds were issued accordingly. *Ib.*

10. **THE MONTGOMERY AVENUE BONDS ARE NOT BONDS OF THE CITY AND COUNTY OF SAN FRANCISCO**, and the municipality, in its corporate capacity, does not stand in any such relation to these obligations, as renders it liable to be sued upon them for any purpose. *Ib.*
11. **OPENING MONTGOMERY AVENUE NOT A CORPORATE ACT**.—The opening of Montgomery avenue, and dedicating it to public use, under the statute, in question, is not a corporate act, but, an act directed by the state, through its own instrumentalities. *Ib.*
12. **THE BOARD OF PUBLIC WORKS**, created by the act, is a board created by the state, to perform a specific service, under the statute, but is not a branch of the municipal government. *Ib.*
13. **WHO NOT CITY OFFICERS**.—Parties performing duties, by authority of a special statute, without the authority of a municipal corporation, and not acting by virtue of any powers conferred on the corporation by its charter, or otherwise, do not act as officers, or agents, of the corporation; and the corporation, not being the principal, their acts, so performed, are not the acts of the corporation. *Ib.*

See MANDAMUS.

MORTGAGE AND MORTGAGE TAX.

1. **MORTGAGE TAX LAW OF 1882**.—On the question of whether this act of the legislature conforms to the constitution of Oregon, this court follows the judgment of the supreme court of the state in *Mumford v. Sewell*, 11 Or., 67, and *Crawford v. Linn county*, Id., 482; and on the question it is in conflict with the constitution of the United States, the ruling of this court in the *Dundee Mortgage Trust Investment Company v. School District No. 1*, 19 Feb. Rep., 359 and 21 Id., 151, is followed. *D. M. I. Co. v. Parrish*, 92.
2. **AN ACT FOR RAISING REVENUE**.—The mortgage tax law does not levy any tax or raise any revenue, but only provides that when a tax is levied or a revenue raised that mortgages shall contribute thereto as land. *Ib.*
3. **UNEQUAL ASSESSMENTS**.—Where the law requires that mortgages shall be valued for taxation at their face value, and all lands at their "true cash value," and the assessor of a county wilfully and uniformly values the mortgages on lands therein at their face value, and the lands therein at only one-third of their cash value, such assessment is illegal, and the payment of the two-thirds of the tax thereby imposed on said mortgages may be enjoined. *Ib.*
4. **TENDER OF PAYMENT OF TAX**.—A suit to enjoin the collection of a tax cannot be maintained in the courts of the United States, unless it appears that the plaintiff has paid, or offered to pay, so much of such tax as he concedes to be due or as may be shown that he ought to pay. *Ib.*

5. "SUBJECT" OF AN ACT AND "MATTER PROPERLY CONNECTED THEREWITH."
TWO COUNTY MORTGAGE VOID. The clause in § 3 of the act of October 1882 (Ses. Laws, 65) commonly called "the Mortgage Tax law," which declares that all mortgages or other obligations whereby land in more than one county "is made security for the payment of a debt, shall be void," is a "matter properly connected" with the "subject" of the act, and therefore not in contravention of § 20 of Article IV of the constitution of the state; and a mortgage executed by the defendant to plain- as trustee, of its road and property in several counties in Oregon to secure the payment of certain bonds of the same date, in violation thereof, is void and of no effect. *F. L. & T. Co. v. O. & C. R. Co.*, 100.
6. CONSTRUCTION OF STATUTE. A plain provision of a statute cannot be construed so as to exclude a particular case from its operation upon a guess or conjecture, however probable, that the legislature did not actually contemplate or consciously intend its application thereto. *Ib.*
7. INSTALLMENT OF INTEREST—LIEN OF MORTGAGE MAY BE ENFORCED FOR. When a debt payable at a future day, with interest, payable in the meantime at stated intervals, is secured by mortgage, and default is made in payment of an installment of such interest, a suit in equity may be maintained to enforce the lien of such mortgage, so far as such installment is concerned, by a sale of so much of the mortgaged property as may be necessary to pay the same; but if such property cannot be sold in parcels without injury to the parties, or one of them, then the court may order the whole of it sold, free from the lien of the mortgage, and apply the proceeds on the whole debt according to its then value.

MULTIFARIOUSNESS.

See EQUITY.

MUNICIPAL BONDS.

See SAN FRANCISCO.

MUNICIPAL CORPORATIONS.

See INJUNCTION.

MUTUALITY.

See CONTRACT.

NAVIGABLE WATERS.

1. NAVIGABLE WATERS IN OREGON—POWER OF THE STATE OVER.—Under ruling in *Cardwell v. Bridge Company*, 113 U. S. 205, the provision in an act of congress of February 14, 1859 (11 Stat. 383), admitting Oregon into the Union, which declares that "the navigable waters of said state shall be common highways and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll therefor," does not prevent the state from authorizing the erection of a bridge across the Wallamet river at Portland, however much it may impede and obstruct the navigation thereof; nor has the United States circuit court any jurisdiction of a suit to enjoin the same. *Sheerer v. Col. River Bridge Co.*, 575.

NEGLIGENCE.

1. TELEGRAPHY—BUSINESS OF—RESPONSIBILITY OF PERSON EMPLOYED IN—A person engaged in the business of telegraphy, or the transmission of messages for hire, by means of electricity, is a public servant, and responsible to the party injured for any loss arising from his negligence in transmitting or delivering such a message; but he is not liable as an insurer of said message against errors consequent upon causes beyond his control. *Abraham v. W. U. T. Co.*, 28.
2. PARTY ASSUMING RISK OF KNOWN DANGER.—Where an employee in a mining tunnel knows that the roof of the tunnel at a given point is in an unsafe condition, and with such knowledge engages in the work of making it safe, voluntarily, sits down to rest himself under the dangerous point during a suspension of his work, and, while so seated, is killed by the falling of the roof upon him, the owners of the tunnel are not liable to an action for his death in favor of the surviving wife and children. *Bunt v. S. B. G. M. Co.*, 178.

NONSUIT.

1. NONSUIT IN NATIONAL COURTS.—A nonsuit at the close of the plaintiff's case is never granted in the national courts. The proper practice in such courts, where the evidence for plaintiff fails to make a *prima facie* case, is, to instruct the jury to find a verdict for the defendant. *Bunt v. S. B. G. M. Co.*, 178.
2. INSUFFICIENT EVIDENCE.—Where the evidence is such that the court would feel bound to set aside any verdict in favor of plaintiff, it is the duty of the court to direct a verdict for defendant. *Ib.*

OPIUM.

See CHINESE.

OPTION.

See CONTRACT

PARTIES.

See EQUITY.

PATENTS, LANDS.

1. CONCLUSIVENESS OF PATENT IN CASES OF FRAUD IN PROCEEDINGS BEFORE LAND OFFICE.—The doctrine of the conclusiveness of judgments and decrees of courts as between those who are parties to the litigation, is not applicable to the United States in respect to proceedings before the land officers for obtaining patents for the public lands, in cases where fraud is practiced and where there was no contest, and the proceedings were wholly *ex parte*. *U. S. v. Rose*, 83.
2. FRAUD IN OBTAINING PATENT.—Where a patent has been issued upon false and fraudulent representations made by the patentee to the land officers, supported by perjury, there having been no contest and the proceedings having been wholly *ex parte*, a court of equity will annul the patent, at the suit of the United States. *Ib.*

See PUBLIC LANDS; EQUITY.

PATENTS AND PATENT RIGHTS.

1. **PATENTS FOR INVENTIONS—PRIOR RECOVERY.**—In an action by a patentee, to recover damages for the use of a patented article which sets up that the article used was purchased by the defendant manufacturer, against whom the patentee had brought suit, and obtained a decree for an accounting, in which account the article in question was included, does not state a defense if there is a further allegation that the decree against the manufacturer was satisfied by payment or otherwise. *Fisher v. Con. A. M.*, 100.
2. **PATENT No. 93,157 FOR NICKEL PLATING INFRINGED.**—The infringement of the first and fourth claims of Adams' patent for nickel plating. *United Nickel Co. v. C. E. W.*, 250.
3. **DR. BOETTGER'S PROCESS** is not an anticipation of Adams' invention.
4. **ADAMS' INVENTION CONSISTS OF A DISCOVERY** of the conditions under which it is possible to make nickel plating a practical art, and the process by which it is made available in the practical uses of life. *Ib.*
5. **PERSUASIVE EVIDENCE OF NOVELTY.**—Where the value of an invention has long been known, and a want of it long recognized in the affairs of life, without having been supplied, the fact, that after a process for nickel plating had been brought to the attention of the world, it was extensively adopted in the arts, and was in general use, is, of itself, persuasive evidence of the novelty of the invention. *Ib.*
6. **ESTOPPEL BY LICENSE.**—Where a patent contains several claims, substantially, covers a distinct invention, and it grants a license to use the invention covered by one of the claims, the licensee is not estopped thereby from recovering for an infringement covered by another, and different claim, in the event the infringement be accomplished by aid of the invention to which the license extends. The license only operates as an estoppel in the use of the particular invention covered by the license. *Ib.*
7. **PATENTS FOR INVENTIONS—INFRINGEMENTS—ELECTION OF REMEDY.**—**INFRINGEMENT OF PATENTS.**—The patentee may sue at law for a patent fee, one who infringes by using his invention; or in equity for the profits arising from such infringement, or for an injunction against further use. *Bragg v. Stockton*, 5.
8. **SAME—NOVELTY—GONG ATTACHMENTS FOR FIRE-ENGINE HOISTS.**—The claims 3 and 4 in patent No. 6831, issued to Robert Bragg, for gong attachments for fire-engines, sustained. *Ib.*
9. **SAME—REGISTERING STROKE OF ALARM.**—The third claim of patent No. 173,261, issued to Robert Bragg, for an invention registering strokes for giving a fire alarm, sustained. *Ib.*
10. **SAME—PRIOR USE—NOTICE.**—Testimony taken before the examiner in support of an objection, tending to show prior use, will be rejected if it is shown that no notice of such prior use has been given, and it has been taken up in the answer. *Ib.*

PILOTAGE.

1. **PILOTAGE ON COLUMBIA RIVER—RIGHT OF MASTER TO CHOOSE PILOT.**—The Columbia river is the boundary between two states—Oregon and Washington—within the purpose and spirit of section 4236 of the Revised Statutes of the United States.

statutes, and therefore the state of Oregon cannot require a vessel bound in or out of said river to take an Oregon pilot or pay him half or any pilotage, if the master thereof prefers to and does take a Washington pilot. *The Abercorn*, 530.

PLEADING AND PRACTICE.

1. **SHAM, REDUNDANT AND IMMATERIAL ALLEGATIONS IN ANSWER.**—(1) An allegation in an answer denying knowledge of a matter alleged in the complaint, will not be stricken out as sham, unless it appears that the same must be false: (2) An allegation in a complaint that the plaintiff, a British corporation, "is a citizen of Great Britain," is meaningless and immaterial, and so is a denial of the same in the answer: (3) It is not necessary that a corporation formed under the law of Great Britain, to construct, own, operate and lease railways in Oregon; should specify in its memorandum of association, the termini thereof, and therefore an allegation in an answer to a complaint in an action by such a corporation on a lease of its road, that it had not made such a specification, is immaterial: (4) An allegation of fact in an answer which is not *per se* a defense to the action and is not attempted to be made so, by any proper averment, is immaterial: (5) A mere denial of the lessee corporation's power to execute a lease of a railway in an action thereon, by the lessor corporation to recover rent, is a conclusion of law and immaterial: (6) An allegation by the lessee corporation in such action that the lessor's road had no near connection with its road, that the capital stock of the latter was not contributed to operate leased roads, that the lease was not ratified by its stockholders, or that it was signed by its president and secretary without the state of its origin, is immaterial: (7) In an action by the lessor to recover the rent reserved in a lease, an allegation in the answer to the complaint, that the lessee did not occupy the premises during the period for which the rent is demanded, is immaterial, unless it is further alleged that such non-occupation was the direct result of the fault or misconduct of the lessor. *O. Ry. Co. v. O. R. & Nav. Co.* 585.

PORTLAND.

1. **DEDICATION TO PUBLIC USE.**—A dedication of real property to public use as a levee or landing on the bank of a navigable water implies and vests in the public a right to use the same without a grantee being named or in existence; and it rests with the legislature, as the representative of the public, to regulate such use and to promote the same by improving the premises directly or through the agency of the municipal corporation within whose limits the same are situated or otherwise. *Coffin v. Portland*, 601.
2. **IDEM—ACCEPTANCE AND CONTINUANCE OF.**—No formal acceptance of such dedication is necessary; nor does the existence of such easement depend on the extent of the use or improvement of the premises, or that they are used or improved at all. *Ib.*
3. **DEDICATION FOR A "PUBLIC LEVEE."**—In 1850 the occupants of the Portland land claim dedicated a strip of ground on the river, within the limits of the town they had laid out thereon, as a "public levee," and so designated it on the plat of the survey: *Held*, That the intent and understanding was to dedicate the property to public use as a landing-place for

the use of water craft and the transfer of freight and passengers from the river. *Ib.*

4. **POWER OF THE STATE OVER DEDICATION TO PUBLIC USES.**—regulate the use of and improve the public landing, and collection of tolls for the maintenance of wharves and thereon, but it has no interest in the property, and cannot subject it to any use clearly inconsistent with the purpose of the act, and if it undertakes to do so, the property is not affected but will it thereby revert to the donor or his heirs. *Ib.*
5. **ACT OF 1885 CONCERNING THE LEVEE.**—The act of 1885 (Session Laws, 1885, p. 100) construed to give the P. & W. V. Ry. Co. the right to use and improve levees as a public landing by the construction of wharves, wharves, and terminal railway facilities thereon for the public use. *Ib.*

PRE-EMPTION LAWS.

1. **CERTIFICATE OF PURCHASE UNDER PRE-EMPTION LAW.**—A certificate of purchase issued in due form, in favor of a pre-emptor, for land to entry under the pre-emption law, cannot be canceled or annulled by the land department for alleged frauds in obtaining it; but, if the government must seek redress in the courts where the matter is heard and determined according to the law applicable to the facts and the individuals in like circumstances. *Smith v. Ewing*, 56.
2. **INNOCENT PURCHASER.**—Sembles, that a purchaser in good faith, for valuable consideration, from a pre-emptor, of the land included in the latter's certificate of purchase, takes the same purged of all claims which might have been committed in obtaining said certificate.

PROMISSORY NOTE.

1. **PROMISSORY NOTE—ASSIGNMENT OF MAIL CONTRACT—CUTTING OF ROUTE—FAILURE OF CONSIDERATION—PAROLE EVIDENCE INADMISSIBLE TO VARY WRITTEN CONTRACT.**—The defendants executed their promissory note in pursuance of a written contract for and in payment of an assignment to them of a governmental contract for carrying the mail on a route which was, under the existing law, liable at any time to be paid by the government, with a corresponding reduction of the amount of the note to be paid. The route was cut down, after the assignment, and a corresponding reduction made in the amount of money paid under the contract: *Held*, in an action on said note, that the cutting of the route, and the reduction of the amount paid, did not constitute a failure of consideration for the note; and that in the absence of the provision in the written contract for the assignment, parole evidence was inadmissible to show a verbal agreement, at the time the note was made, whereby the defendants were to be liable, on their note, for the portion of the route that was continued. *W. F. & Co. v. U. S.*

PUBLIC LANDS.

1. **PUBLIC LANDS—ACT OF CONGRESS OF SEPTEMBER 28, 1850—OVERFLOWED LANDS.**—The act of congress of September 28, 1850, relating to each state then in the Union its swamp and overflowed lands, effected an immediate transfer of interest, which cannot be in any way impaired by the delay or refusal of the secretary of the interior.

- rrior to have the required list made and patent issued. *Sen. F. Sav. Union v. Irwin*, 667.
2. **SAME—ISSUE OF PATENT—PAROL TESTIMONY.**—Wherever the secretary of the interior has made out and certified a list of the swamp and overflowed lands as required by the act of congress of September 28, 1850, which confers them upon the state in which they are situated, and has issued the patent, his determination is so far conclusive as to the character of the land that it cannot be collaterally attacked; but where he has failed to make such list, and to issue the patent, it is competent for the state, or parties claiming from it, to prove by parol testimony that the land is of the character mentioned in the act of 1850. *Ib.*
 3. **UNITED STATES AND EXECUTIVE DEPARTMENT—NAVY OFFICER—UNJUSTIFIABLE RETENTION OF PROPERTY.**—The fact that one is an officer of the navy of the United States, and is acting under their orders, gives no justification for the retention of the premises against the claim of the true owner. *Ib.*
 4. **WATERS AND WATERCOURSES—ISLANDS—LIMIT TO PRIVATE OWNERSHIP.**—Private ownership of the land of Mare island did not, under the grant of the Mexican government, extend to lands regularly covered each month by the flow of the tides. *Ib.*
 5. **UNITED STATES AND EXECUTIVE DEPARTMENTS—STATUTE OF LIMITATIONS.**—Legal proceedings to enforce the claim of a citizen to lands in possession of the United States cannot be taken, and the statute of limitations cannot run against one to whom the courts are thus closed for the maintenance of his claim. *Ib.*

PUBLIC USE.

1. **DEDICATION TO PUBLIC USE.**—A dedication of real property to public use as a levee or landing on the bank of a navigable water implies and vests in the public a right to use the same without a grantee being named or in existence; and it rests with the legislature, as the representative of the public, to regulate such use and to promote the same by improving the premises directly or through the agency of the municipal corporation within whose limits the same are situated or otherwise. *Coffin v. Portland*, 601.
2. **IDEM—ACCEPTANCE AND CONTINUANCE OF.**—No formal acceptance of such dedication is necessary; nor does the existence of such easement depend on the extent of the use or improvement of the premises, or that they are used or improved at all. *Ib.*
3. **DEDICATION FOR A "PUBLIC LEVEE."**—In 1850 the occupants of the Portland land claim dedicated a strip of ground on the river, within the limits of the town they had laid out thereon, as a "public levee," and so designated it on the plat of the survey: *Held*, That the intent and understanding was to dedicate the property to public use as a landing-place for the use of water craft and the transfer of freight and passengers to and from the river. *Ib.*
4. **POWER OF THE STATE OVER DEDICATION TO PUBLIC USES.**—The state may regulate the use of and improve the public landing, and authorize the collection of tolls for the maintenance of wharves and warehouses thereon, but it has no interest in the property, and cannot devote or subject it to any use clearly inconsistent with the purpose of the dedication, and if it undertakes to do so, the property is not affected by the act, nor will it thereby revert to the donor or his heirs. *Ib.*

5. **ACT OF 1885, CONCERNING THE LEVEE.**—The act of 1885 (Sess. L. 100) construed to give the P. & W. V. Ry. Co. the right to use and improve the levee as a public landing by the construction of wharves, warehouses and terminal railway facilities thereon for the public use. *Ib*

QUI TAM ACTION.

1. **ACTION UNDER SECTIONS 3490-94 OF THE R. S.**—An action brought by a private prosecutor under sections 3490-94 of the R. S., to recover damages and forfeiture for a violation of section 5438 of the R. S., is what was known as common law as a "popular" or *quitam* action, and is under the sole and exclusive control of said prosecutor, subject to the restriction on his right to discontinue the same contained in section 3491 of the R. S., and his interest or share in any judgment obtained therein is his absolute private property, and the United States cannot compromise, remit or release the same by pardon or otherwise. *U. S. v. Griswold, 65.*

RAILROAD CORPORATIONS.

1. **CORPORATION ACT—VESTED RIGHT THEREUNDER CANNOT BE IMPAIRED OR DESTROYED BY THE LEGISLATURE.**—The power of the legislature to alter or repeal the general incorporation act of Oregon is qualified, so that it cannot thereby "impair or destroy any vested corporate right." *Ex parte Koehler, 37.*
2. **RIGHT TO A REASONABLE COMPENSATION.**—A railway corporation, formed under the general corporation act of Oregon, has a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road, which the legislature cannot impair or destroy. *Ib.*
3. **LEGISLATURE MAY PRESCRIBE RATES OF TRANSPORTATION.**—The legislature may prescribe rates of transportation, and the same will be presumed to be reasonable until the contrary is shown, but the judiciary are the final judges of what is reasonable, or what "impairs" the vested right of the corporation to a reasonable compensation for its services. *Ib.*
4. **DISCRIMINATION BY RAILWAY CORPORATIONS.**—The legislature may prohibit any discrimination by a railway corporation between persons or places, unless the same is done to enable it to retain or secure business at a point or place where there are competing lines of transportation, and in such case it may charge less for a long haul than for a short one in the same direction, so long as the charge for the latter is reasonable. *Ib.*

RAILROAD LAND GRANT.

1. **RAILROAD LAND GRANT WITHIN THE MEXICAN GRANTS.**—Under the act of 1866 (14 Stats., 239), granting land to aid in the construction of the California and Oregon railroad, lands outside the forty-mile limit of the specific grant, and within the exterior limits of an alleged Mexican grant, are subject to selection in lieu of the alternate odd sections otherwise disposed of, at the time of the definite location of the road, situated within the forty-mile limit, at any time after the final rejection of such Mexican grant. *U. S. v. C. P. R. R. Co., 438.*
2. **LIEU LANDS.**—The grant does not attach to the odd sections of lands outside the forty-mile limit of the specific grant, until the selection is, actually, made by the railroad company under the direction of the secretary of the interior, in lieu of lands otherwise disposed of within said limit. *Ib.*

3. **SAME.**—If at the time such selection of outside lieu lands is made, a claim under a Mexican grant embracing the lands selected within its exterior limits, has been finally rejected, the lands have ceased to be *sub judice*, and are subject to selection. *Ib.*
4. **PREMATURE SELECTION.**—Although such lieu lands have been selected and patented, prematurely, before the final rejection of the grant, yet, in a suit by the United States to vacate the selection and patent, commenced long after the final rejection of the grant, on the ground that it was issued by mistake, will not be sustained, where it does not appear, that any private party has acquired any interest in the lands so selected, or that the government has become subject to any obligation in relation to said land, and has sustained no injury by reason of such premature selection, and patent. *Ib.*
5. **SAME.**—In such case, if the patent were vacated, the railroad company would now be entitled to select an equal amount of other lands within the limits, and even to select the same lands, they being now subject to selection, and to receive a new patent therefor. A court of equity will not correct a mutual, innocent, mistake from which no injury can result, when it would be inequitable to do so. It will not do a vain thing. *Ib.*
6. **INDISPENSABLE PARTIES.**—The owners of the land at the time of filing a bill in equity to vacate a United States patent are indispensable parties to the bill; and where it appears at the hearing, that the bill is filed, only, against parties who have no interest in the lands, it will be dismissed for want of necessary parties. *Ib.*
7. **EXTERIOR BOUNDS OF MEXICAN GRANT.**—Where three exterior boundaries of a Mexican grant, and the quantity of land are designated, the fourth exterior boundary is found by running a line parallel to the opposite boundary, a sufficient distance therefrom, to include the quantity of land called for. *Ib.*
8. **STATUTE JULY 25, 1866 (14 Stats. 239), construed; *Newhall v. Sanger*, 92 U. S. 761, distinguished. This case same as *Ryan v. Central Pacific Railroad Company*, (5 Sawy. 260, affirmed in 99 U. S. 382.) *Ib.***
9. **GRANT TO THE O. & C. RY. CO. BY THE ACT OF 1866.**—The grant of lands and the right of way to the O. & C. Ry. Co., by the act of July 25, 1866 (14 Stat. 239), and the act of June 25, 1868 (15 Stat. 80), construed to be: 1. A grant of the odd sections of land within ten miles on each side of the line of the road, not otherwise appropriated or disposed of under the laws of the United States, prior to the definite location of said line, on condition that the road is completed by July 1, 1880, for a breach of which condition the grantor alone can claim a forfeiture. 2. The grant of the right of way is absolute, to take effect on the definite location of the line of the road from the passage of the act of 1866 as against any person claiming under a settlement or appropriation subsequent to the passage thereof without condition, save that which the law tacitly annexes to the grant of any such franchise, the liability to be lost or forfeited for non-user, ascertained and determined in a judicial proceeding, instituted by the government for that purpose. *Bybee v. O. & C. R. Co.* 479.
10. **IDEM.**—The declaration of section 8 of the act of 1866, that in case the road is not completed by the time prescribed—"this act shall be null and void"—taken in connection with the context, that the lands not patented to the company at the date of any such failure—"shall revert to the United

States"—and the general purpose of the act and the policy of congress in passing it, amounts to nothing more than a declaration that the lands are granted on the condition that if the road is not completed in due time, the portion then remaining unpatented or unearned, may be reclaimed by the United States. *Ib.*

RAILWAY TRANSPORTATION.

1. **DISCRIMINATION BY RAILWAY CORPORATION.**—Notwithstanding the Houlst act, a railway corporation may charge less for a long haul than a short one in the same direction, when the rate for the long haul is made necessary by other lines of transportation competing for business at the point from whence the long haul is made; and where the road of such corporation forms a part of a line of transportation, consisting partly of water carriage, between two principal points, the rate may be made so as to enable it to compete with another road that constitutes a part of another line of water and railway transportation between the same points. *In re R. Koehler*, 92.
2. **PROVISO TO SECTION 2 OF THE HOULT ACT.**—Under this proviso, which excepts from the operation of the act "goods intended in good faith to be shipped to points beyond the limits of the state," wheat intended by the shipper to be sent directly to San Francisco, or other points beyond the limits of the state, via Portland, may be carried on the O. & C. road from Corvallis to the latter place without reference to said act. *Ib.*

RECEIVERS.

See RAILROAD CORPORATIONS.

REMOVAL OF CAUSES.

1. **REMOVAL OF CAUSE—SUIT ARISING UNDER A LAW OF THE UNITED STATES.**
A suit by a vendee of the state under the act of October 26, 1870, providing for the selection and sale of the swamp and overflowed lands granted to the state, by the act of March 12, 1860, to enjoin the commission of a nuisance on the land so purchased involves the question of whether said land was granted to the state by said act at the time of its selection by the state under said act of 1870, and therefore arises under said act of March 12, 1860, and is removable into this court under section 2 of the act of March 3, 1875, without reference to the nature of the other questions that may be involved in it. *Miller v. Wattier*, 74.
2. **REMOVAL—CITIZENSHIP.**—A suit cannot be removed from a state to a national court, under the act of 1875, on the ground of citizenship, unless the requisite citizenship of the parties exists, both when the suit was commenced and at the time of filing the petition for removal. *Endey v. C. F. Ins. Co.*, 137.
3. **AMENDMENT OF PETITION IN UNITED STATES COURTS.**—Where a petition for removal does not show the requisite citizenship of the parties, whether the circuit court is authorized to allow an amendment showing jurisdiction, *quere?* But, conceding the power, where the state court has refused to order the removal of a cause on a defective petition, an amendment in the United States circuit court, to remedy the defect, is not a matter of right, and the court in the ninth circuit will not permit an amendment. Inconvenience of allowing amendments in such cases pointed out. *Ib.*

4. **TIME OF REMOVAL**.—A petition for removal must be filed at the term when the case can first be put at issue and tried, or it will be too late. In California sessions provided for are terms. *Theurkauf v Ireland*, 512.
5. **COURTS—JURISDICTION—STATE AND NATIONAL COURTS—CONSTRUCTION OF STATUTE**.—A question involving the right to public land claimed by one of the parties to have been pre-empted by him under a statute of the United States, does not fall within the jurisdiction of the circuit court unless it actually involves the construction of a United States statute. *Ib.*

RES ADJUDICATA.

1. **RES JUDICATA**.—The obligation of White under said agreement, and the fact of his having performed the same, is *res judicata* since July 13, 1875, by the judgment of a competent court, in *White v. Elliott. Hickox v. Elliott*, 624.

See CHAMPERTY, ESTOPPEL.

RESCINDING CONTRACT.

See EQUITY.

RESTRICTION ACT.

1. **CHINESE RESTRICTION ACTS—MERCHANTS TEMPORARILY DEPARTING**.—A Chinese merchant, residing and doing business in the United States, who temporarily departed therefrom before the passage of the Chinese restriction act, is entitled to re-enter the same without producing the certificate required by section six of the act of 1882, as amended in 1884. *In re Ah Ping*, 17.
2. **THE SAME—RESTRICTION ACTS HOW CONSTRUED**.—The acts of congress, commonly called the Chinese restriction acts, should be so construed, if possible, as not to bring them into conflict with stipulations in the treaties between the United States and China. *Ib.*

See CHINESE.

SALVAGE.

1. **SALVAGE—AMOUNT OF AWARD—HOW ESTIMATED**.—The elements which enter into the estimate in fixing the amount of compensation for a salvage service are: (1) The value of the property saved and of that employed in saving it; (2) the degree of peril from which the saved property is delivered; (3) the risk to which the property and persons of the salvors are exposed; (4) the severity and duration of the labor; (5) the promptness with which the services are interposed; and (6) the skill, courage, and judgment involved in the services. *Queen of Pacific*, 195.
2. **SAME—DECREE OF DISTRICT COURT AFFIRMED**.—As in this case all of the elements which go to justify the largest allowance are found, except that the duration of the labor was not long, and the risk to the salvors and their property, though very considerable, was not of a very extreme character, the decree of the district court awarding sixty-four thousand seven hundred dollars, or about ten per cent. of the value of the property saved, is affirmed, with interest upon the amount of the award from the date of the decree of the district court at the rate of six per cent. *Ib.*

SAN FRANCISCO.

1. **FEDERAL COURTS FOLLOW STATE COURTS IN CONSTRUING STATE STATUTES** unless such construction conflicts with or impairs the efficiency of some principle of the federal constitution or of a federal statute, or a rule of commercial or general law. *Liebmann v. San Fran.* 147.
2. **THE CONSTRUCTION OF THE "MONTGOMERY AVENUE ACT" of April 1, 1872,** of the California legislature, by the state supreme court in *Mulligan v. Smith*, 59 Cal. 206, approved and followed. *Ib.*
3. **THE PETITION OF PROPERTY OWNERS FOR OPENING MONTGOMERY AVENUE** in San Francisco, provided for in the California statute of April 1, 1872, was essential to the validity of the proceedings, including the issue of the bonds authorized by the act, and the sufficiency of the petition must be affirmatively shown to maintain an action on the bonds, unless it can be conclusively presumed from the character of the bonds or their recitals. *Ib.*
4. **RECITALS IN MUNICIPAL BONDS OF COMPLIANCE WITH THE STATUTE** authorizing their issue, estop the obligors from denying such compliance, as against *bona fide* purchasers of the bonds, for value, and without notice of any defect in the proceedings. *Ib.*
5. **RECITALS IN MUNICIPAL BONDS MUST CLEARLY IMPORT COMPLIANCE** with the statute authorizing them, in order to estop the obligors from showing that they were issued without authority of law. *Ib.*
6. **THE MONTGOMERY AVENUE BONDS CONTAIN NO SUFFICIENT RECITALS** of compliance with the statute under which they were issued, the clause relied upon as a recital being a mere caption, and, at most, importing only that: "In conformity with the act, the treasurer will pay;" that is, that he will pay out of the special fund provided for by the act. *Ib.*
7. **A CITY IS NOT ESTOPPED BY RECITALS IN BONDS NOT ISSUED BY IT,** nor under its authority, but by, and under the name and seal of, a distinct corporation composed of officers of the city, but acting independently of it, created by a special statute providing for the opening of a street in such city and deriving its powers wholly from the statute. Hence, the city and county of San Francisco is not bound by the recitals, if any, contained in the "Montgomery avenue bonds" issued by the board of public works, under the authority of the act of April 1, 1872. *Ib.*
8. **THE PARTY ACTUALLY LIABLE ON A BOND MUST HAVE HIS DAY** in court, in person, or by his representative, before there can be any binding judgment determining its validity against him or his property. *Ib.*
9. **A CITY CANNOT BE SUED ON BONDS NOT ISSUED BY IT,** and upon which the statute authorizing their issue declares that it shall not be liable, merely for the purpose of establishing their validity, so as to obtain a mandamus to compel the levy of the tax provided by the statute for their payment; as where a special statute providing for the opening of a street in a city created a board, to be composed of certain city officers and known as the board of public works, and authorized the board to issue bonds to pay for the lands taken, the bonds to be paid out of a special tax upon the property benefited by the street, and declared that the city should not be liable on the bonds "in any event whatever," and that the holders should take the bonds on that condition, and the bonds were issued accordingly. *Ib.*

10. THE MONTGOMERY AVENUE BONDS ARE NOT BONDS OF THE CITY AND COUNTY OF SAN FRANCISCO, and the municipality, in its corporate capacity, does not stand in any such relation to these obligations, as renders it liable to be sued upon them for any purpose. *Ib.*
11. OPENING MONTGOMERY AVENUE NOT A CORPORATE ACT.—The opening of Montgomery avenue, and dedicating it to public use, under the statute, in question, is not a corporate act, but, an act directed by the state, through its own instrumentalities. *Ib.*
12. THE BOARD OF PUBLIC WORKS, created by the act, is a board created by the state, to perform a specific service, under the statute, but is not a branch of the municipal government. *Ib.*
13. WHO NOT CITY OFFICERS.—Parties performing duties, by authority of a special statute, without the authority of a municipal corporation, and not acting by virtue of any powers conferred on the corporation by its charter, or otherwise, do not act as officers, or agents of the corporation; and the corporation not being the principal, their acts, so performed, are not the acts of the corporation. *Ib.*

SEAMEN.

1. SEAMEN NOT ALLOWED LAY ON BONE OBTAINED BY BARTER.—Charges by master for "slops" disallowed. The seamen denying that they were justified, and the master producing no account books or other evidence that they were supplied. *The Bark Hunter*, 426.

STATUTES CONSTRUED.

Stat. of 1883; 22 Stat. 523; Duties, sec. 2907, R. S. <i>Meyers v. Shurtleff</i>	50
Sec. 3490-94, 5438 and 3491. U. S. v. Griswold.....	65
Sec. 2907, R. S. U. S. v. Adams.....	103
1883, 22 Stat., 523. U. S. v. Adams.....	103
Sec. 3639, R. S. U. S. v. Adams.....	103
Sec. 824, R. S. <i>Mercartney v. Crittenden</i>	113
Sec. 764, R. S. (Amended Session Laws, 1884, 437). <i>Sun Hung</i>	173
Sec. 755, R. S. <i>Jung Ah Lung</i>	211
Sec. 720, R. S. <i>Yick Wo</i>	422
1866, July 25, 14 Stat., 239.....	439
1866, July 25, 14 Stat., 239.....	479
Sec. 5336, R. S.....	522
4392, R. S.....	514
4236, R. S.....	530
5519, R. S.....	533

STATUTE OF LIMITATIONS.

See PUBLIC LANDS.

STATUTORY CONSTRUCTION.

1. CONSTRUCTION OF STATUTE.—A plain provision of a statute cannot be construed so as to exclude a particular case from its operation upon a surmise or conjecture, however probable, that the legislature did not actually contemplate or consciously intend its application thereto. *F. L. & T. Co. v. O. & C. R. Co.*, 115.

SURETY.

1. **CREDITOR AND SURETY.**—A creditor who has or acquires a lien on the property of his debtor as a security for his debt, is a trustee of the same for the benefit of his surety, if there be one, and if by any willful act of his such lien is lost or destroyed, to the injury of the surety, the latter is so far discharged from liability for the debt. *Allen v. O'Donald*, 45.
2. **LIABILITY OF A SURETY.**—The liability of a surety in an official bond is *stricti juris*; and he is not to be held responsible for the conduct of his principal beyond the scope of his undertaking, reasonably construed. *U. S. v. Adams*, 103.

SWAMP LANDS.

See PUBLIC LANDS.

TAXES.

1. **MORTGAGE TAX LAW OF 1882.**—On the question of whether this act of the legislature conforms to the constitution of Oregon, this court follows the judgment of the supreme court of the state in *Mumford v. Sewell*, 11 Or., 67, and *Crawford v. Linn county*, Id., 482; and on the question it is in conflict with the constitution of the United States, the ruling of this court in the *Dundee Mortgage Trust Investment Company v. School District No. 1*, 19 Feb. Rep., 359 and 21 Id., 151, is followed. *D. M. T. I. Co. v. Parrish*, 92.
2. **AN ACT FOR RAISING REVENUE.**—The mortgage tax law does not levy any tax or raise any revenue, but only provides that when a tax is levied or a revenue raised that mortgages shall contribute thereto as land. *Ib.*
3. **UNEQUAL ASSESSMENTS.**—Where the law requires that mortgages shall be valued for taxation at their face value, and all lands at their "true cash value," and the assessor of a county wilfully and uniformly values the mortgages on lands therein at their face value, and the lands therein at only one-third of their cash value, such assessment is illegal, and the payment of the two-thirds of the tax thereby imposed on said mortgages may be enjoined. *Ib.*
4. **TENDER OF PAYMENT OF TAX.**—A suit to enjoin the collection of a tax cannot be maintained in the courts of the United States, unless it appears that the plaintiff has paid, or offered to pay, so much of such tax as he concedes to be due or as may be shown that he ought to pay. *Ib.*
5. **LICENSE TO SELL GOODS.**—A charge on a license to sell goods is a tax thereon. *In re Hanson*, 657.
6. **TAX ON GOODS, WHEN A REGULATION OF COMMERCE.**—A tax imposed by one state on the sale of the products of another state within its limits, which in purpose or effect discriminates against said products and in favor of its own, is a regulation of commerce among the states, and therefore void. *Ib.*
7. **IDEM—WHEN LAWFUL.**—A tax or charge imposed equally on the products of the state imposing it and those introduced from other states, is not a regulation of commerce, but only an exercise of the taxing power of the state. *Ib.*
8. **DRUMMER ORDINANCE.**—An ordinance of the city of Portland requires every person who goes from place to place therein soliciting the purchase of goods, without reference to the place of their product or manufacture, or offering to sell or deliver the same by sample or otherwise, to take out

a license and pay therefor twenty-five dollars per quarter, or so much a day for a less time: *Held*, that on its face the ordinance did not discriminate against the products of any state, and therefore it was not a regulation of commerce, but only a tax; and its character in this respect is not affected by the fact that in some or many instances the revenue derived from the tax may be paid largely or wholly by the products of other states, because the same are not produced in Portland, or the producer therein having less need for the services of a drummer, may not employ one. *Ib.*

TELEGRAPHY.

1. TELEGRAPHY—BUSINESS OF—RESPONSIBILITY OF PERSONS EMPLOYED IN.—A person engaged in the business of telegraphy, or the transmission of messages for hire, by means of electricity, is a public servant, and responsible to the party injured for any loss arising from his negligence in transmitting or delivering such a message; but he is not liable as an insurer of said message against errors consequent upon causes beyond his control. *Abraham v. W. U. T. Co.* 28.

TRUST.

1. CONSTRUCTIVE TRUST.—Where one party, wrongfully, obtains the legal title to land, which, in equity and good conscience, belongs to another, whether he acts in good faith, or otherwise, he will be charged, in equity, as a constructive trustee of the equitable owner. *Lakin v. S. B. M. Co.*, 231.
2. A BONA FIDE PURCHASER, is one who purchases, in good faith, an estate for a valuable consideration, actually paid, without notice of a prior equity. *Ib.*
3. PATENT SURREPTITIOUSLY OBTAINED.—T. and McG., being owners of a mining claim, had a survey made, applied for a patent, published the notice as required by the statute, and no adverse claims having been filed, their right to a patent became perfected. Afterward the M. Co. claiming, without right, to be successor in interest to T. and McG., surreptitiously, procured a patent to itself on the application of T. and McG. *Held*.—That the M. Co. held the title so obtained, charged with a constructive trust in favor of T. and McG., and that it did not lie in the mouth of the M. Co., to say, that T. and McG., have lost their right to the claim by forfeiture or otherwise. *Ib.*

WRIT OF ERROR.

See ESTOPPEL.



In the City and County of San Francisco State of California on the 25th day of August A.D. 1880. I Sarah Althea Hill of City and County of San Francisco State California - age 27 years - do here in the presence of almighty God take Senator William Shannon of the State of Nevada to my lawful and wedded husband and do here acknowledge and declare myself to be the wife of Senator William Shannon of the State of Nevada.

Sarah Althea Hill

August 25th 1880 San Francisco Cal

I agree not to make known the contents of this paper or its existence for ten years unless I shall myself see fit to make it known. Attest

In the City and County of San Francisco State of California on the 25th day of August A.D. 1880. I Senator William Shannon of the State of Nevada - age 60 years - do here in

and meddled with - do here account
of to be the husband of Sarah Althea Hill.

Mr. Shawer Karado
" "

Aug 25 1880
" "

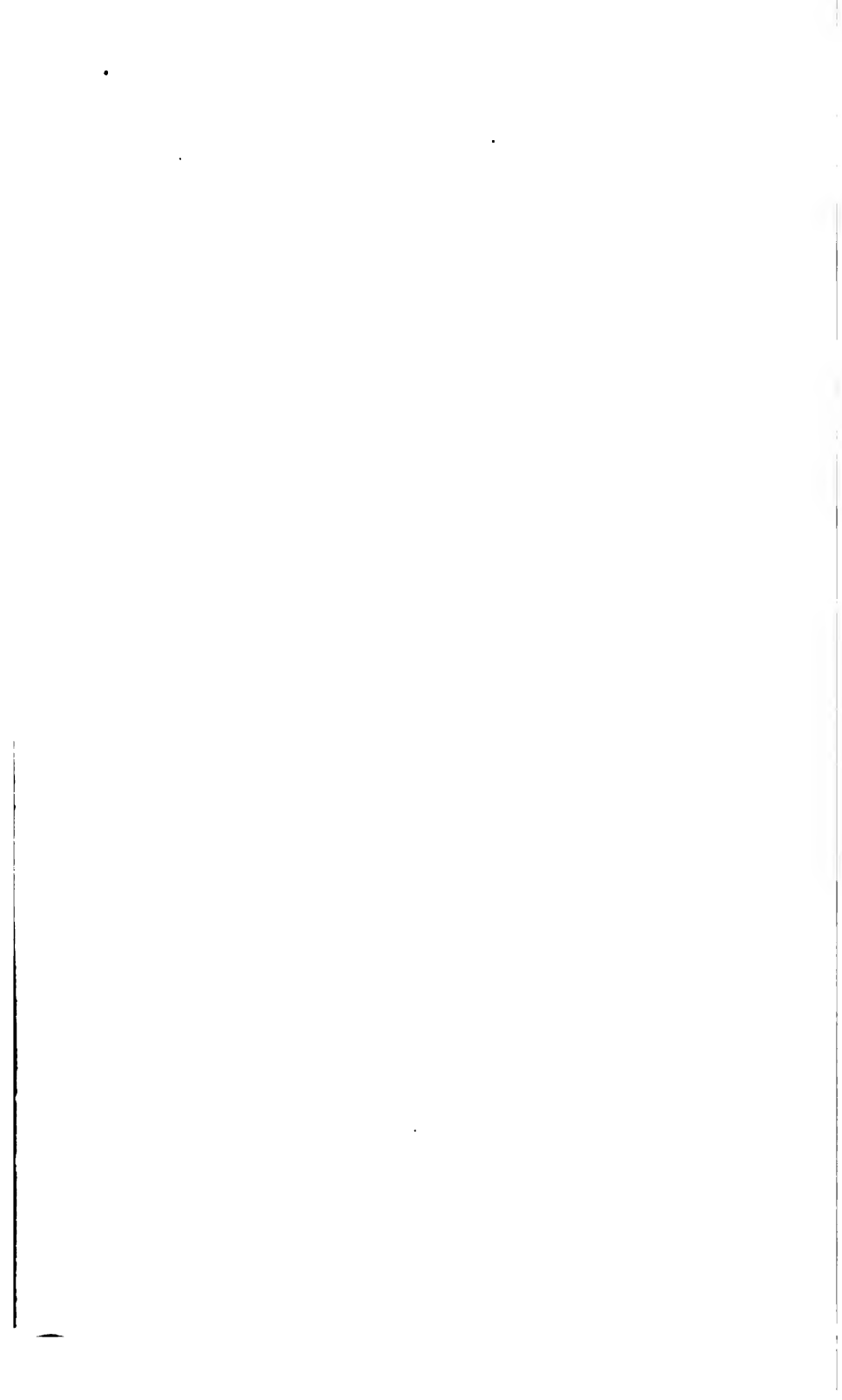
Ex.C

San Francisco, Sep 25th 1882
Plf's Exhibit No 21

My dear Mr. Hill

Can you meet
me this evening or about
-o'clock in Parlor of the Grand
Hotel? Something I want
to tell you about of interest
-surely. Will not do
- meet you at the Baldwin
- if you cannot see me
at the Grand Home a place
at home

Yours truly
J^m Shannon

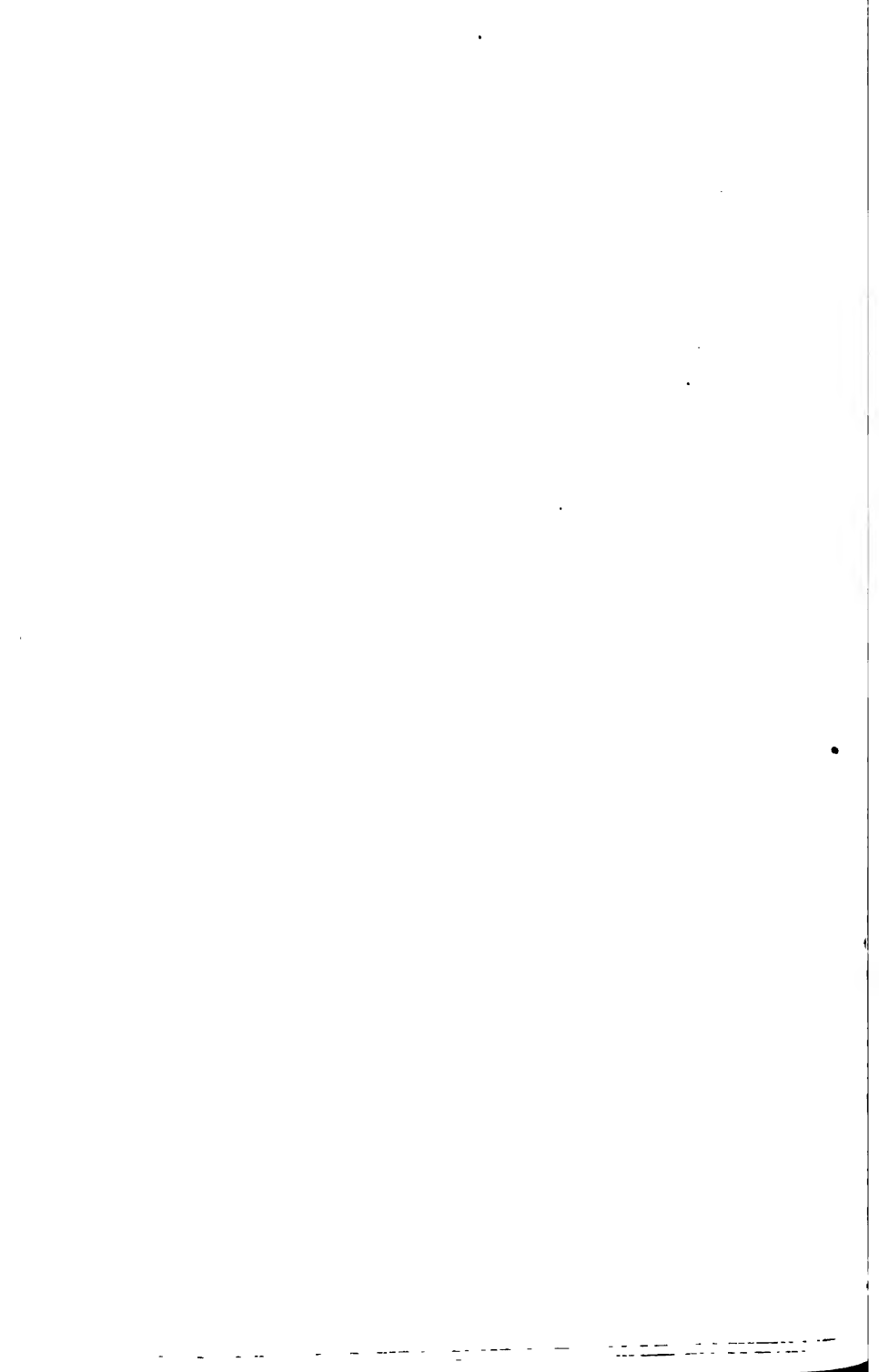


Agency of
The Bank of California
Virginia, Nov. 6th 1880

Mr. Thomas

My dear Sir
I gave Miss Hall a
note to you, and expected
the kind consideration
you her place she
deserves. But it seems
you have not been as
accommodating as you
might be. You will
consider my mother wishes
out a few ^{lines} "Cause of Com-
plaint"

Very truly
Yrs. Wm. Shaw



The Bank of California
Virginia, Mo. Oct. 6th 1880
S

My dear Miss Will

In reply to your
kind letter I have
written Mr. Thorne and
enclosed same to you
which you can read
and then send it to
him in an envelope. And
he will not know that
you have seen it. I am
sorry that anything should occur
to annoy you. And think
thy letter will command
the kind courtesy you deserve.
Am having a very hard & hard
fight but think I sh

Be meticulous in the End
With kindest Consideration
Be true me as ever

Very truly
Yours
J. M. Shaw

My dear wife

In reply to your
kind letter I have
written Mr. Brown and
enclosed same to you
which you can read
And then send it to
him in an envelope. And
he will not know that
you have seen it. I am
that anything should occur
to annoy you. And thank
the letter with command
the kind country I understand
you having a very long and
right But think I shall

be victorious in the End
With kindest regards
I remain ever

Yours
C

"Exhibit Barnett A"

Mr. Shaw.

Mr Shaw

Wm. Shaver

J. M. Shaw

Mr Shaw

Wm. Shaw

Mr. Stacey

Bill Starn

Mr. Sharon

April Sharon

Wm. Shaw

Wm. Shaver

Wm. Lamm

Mr. Shaw

Mr. Shaw

Guylhem

True Shaver

Wm. H. H. H.

Mr. Shaver

Mr. Pearson

Yours Truly,

Ann Shaver



TABLE 1

"MARRIAGE AGREEMENT."

Mr Sharon

Disputed Signature to Marriage Agreement of Aug. 25, 1880.

GENUINE SHARON.

Mr Sharon

Genuine Signature to Check dated Aug. 25, 1880.



Jm Shaw Kerado
" "

Aug 25 1880

" "

GUMPEL.

Jm Shaw Kerado
" "

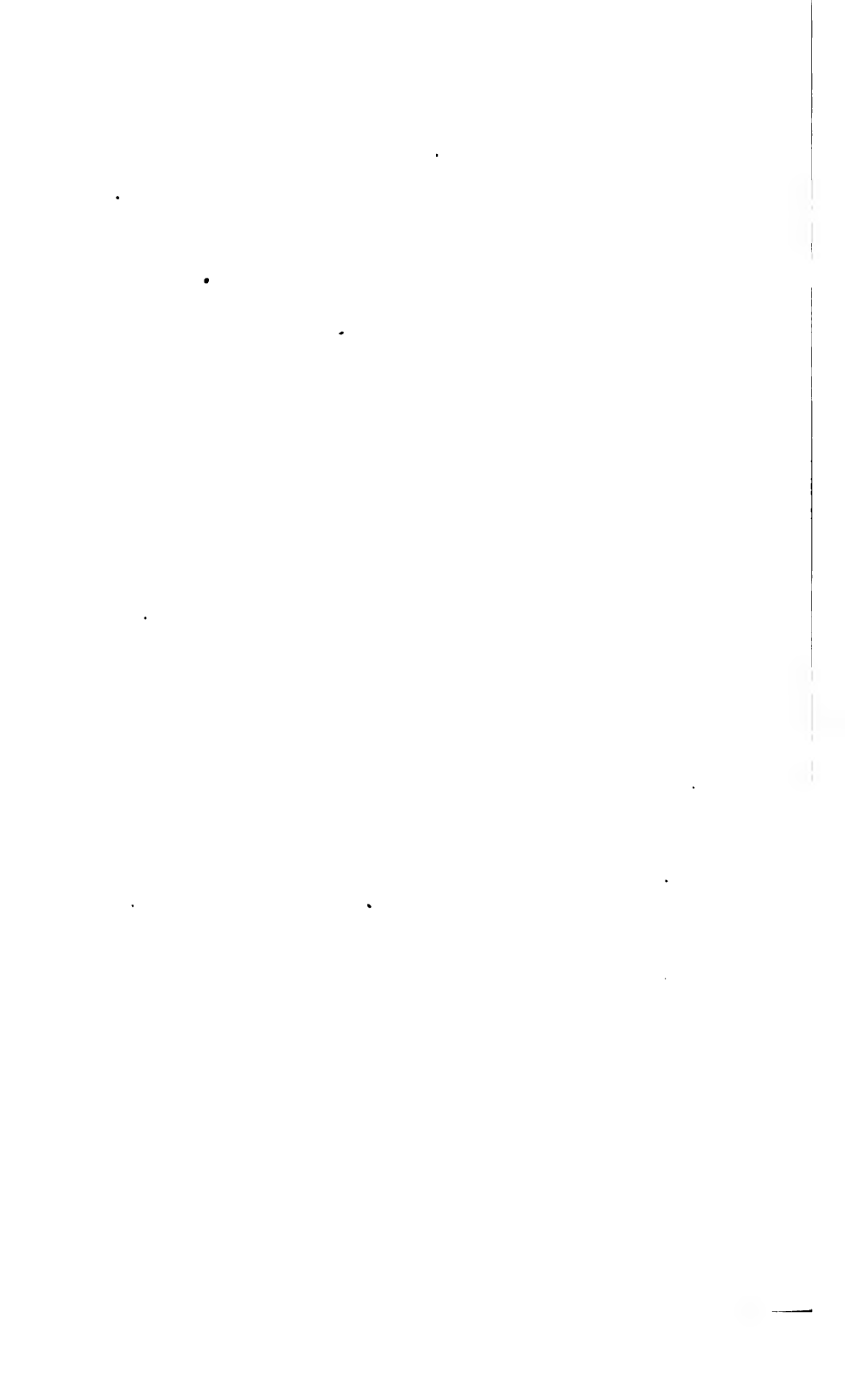
Aug 25 1880

" "

GUMPEL.

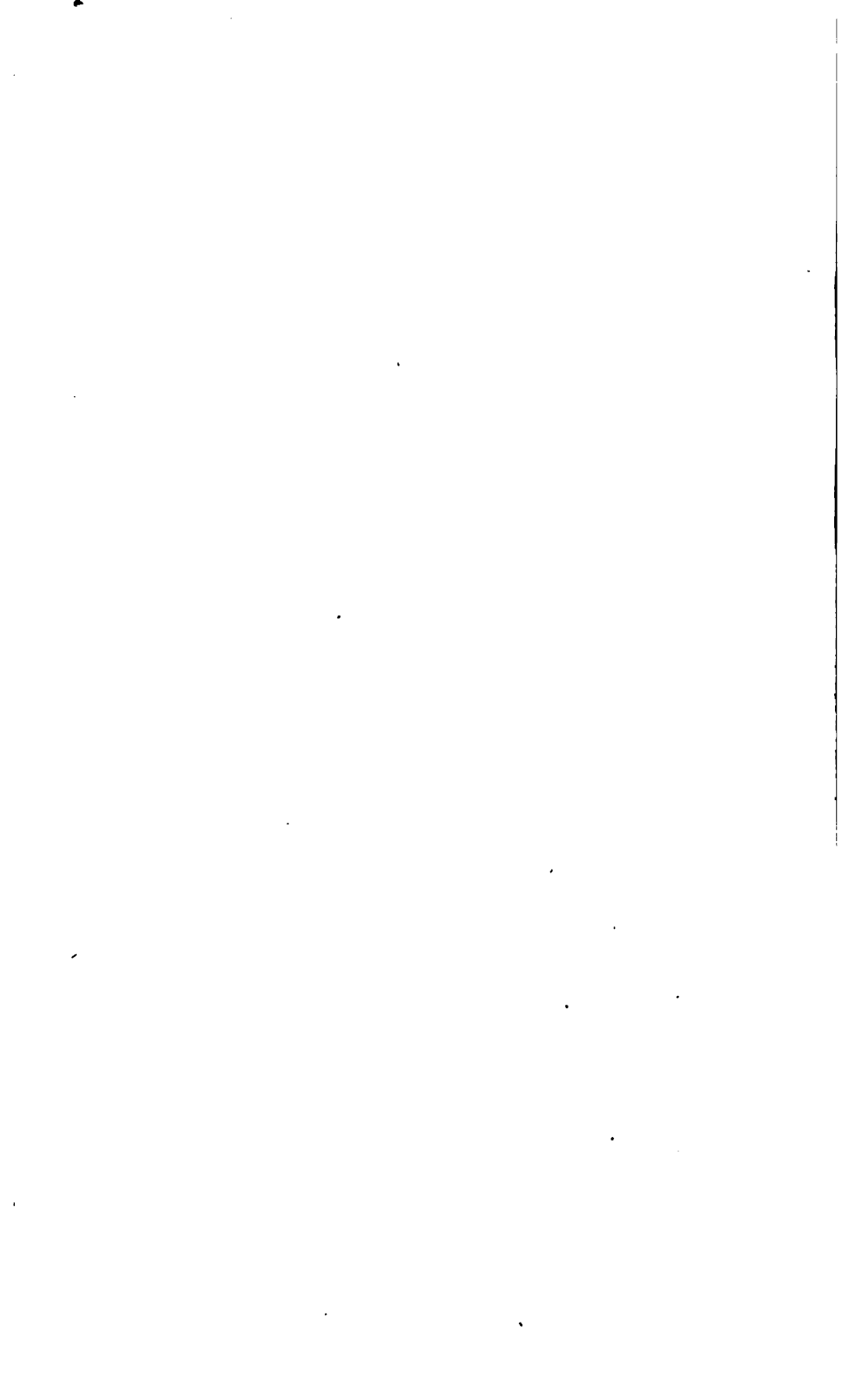
Jm Shaw
" "















Stanford Law Library



3 6105 063 903 996